RECORD, CASE No. 13,969.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 911.74

ISABEL B. EUSTIS AND FLORENCE D. EUSTIS, AS EXECUTRICES OF WILLIAM T. EUSTIS, DECEASED, PLAINTIFFS IN ERROR,

vs.

CHARLES H. BOLLES AND GEORGE F. WILDE.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

FILED FEBRUARY 17, 1893.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the supreme judicial court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court, before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Isabel B. Eustis and Florence D. Eustis, both of Springfield, in the Commonwealth of Massachusetts, executrices under the will of William T. Eustis, late of said Springfield, plaintiffs, and Charles H. Bolles and George F. Wilde, both of Boston, in said Commonwealth, and Francis D. Hall, of Newton, in said Commonwealth, defendants, in an action of contract, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twenty-ninth day of January, in the year of our Lord one thousand eight hundred and ninety.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed as to defendants Bolles and Wilde; disallowed as to defendant Hall, by—

MARCUS MORTON,
Chief Justice of Supreme Judicial Court.

2 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

And now, here, the judges of the supreme judicial court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme judicial court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John Noble, clerk of said su-
[SEAL.] preme judicial court for the county of Suffolk, have hereto set my hand and the seal of said court this sixth day of February, A. D. 1890.

JOHN NOBLE, *Clerk.*

3 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

To all persons to whom these presents shall come, Greeting:

Know ye that among our records of our supreme judicial court, holden at Boston, within and for our county of Suffolk, from the first day of January, in the year of our Lord one thousand eight hundred eighty-nine, to the first day of January, A. D. 1890, it is thus contained, the following being the entire record in the case:

4 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

[SEAL.] To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of Charles H. Bolles and George F. Wilde, both of Boston, in said county of Suffolk, and Francis D. Hall, of that part of Newton known as Newtonville, in our county of Middlesex, late copartners, and doing business in said Boston under the firm name and style of Benjamin Callender and Company, to the value of ten thousand dollars, and to summon the said defendants (if they may be found in your precinct) to appear before our justices of our supreme judicial court next to be holden at Boston, within and for our said county of Suffolk, on the first Monday of July next, then and there, in our said court, to answer unto William T. Eustis, of Springfield, in our county of Hampden, in an action of contract, to the damage
5 of the said plaintiff (as he says) the sum of ten thousand dollars, which shall then and there be made to appear, with other due damages; and have you there this writ with your doings therein.

Witness Marcus Morton, Esquire, at Boston, the ninth day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

JOHN NOBLE, *Clerk.*

COUNTY OF SUFFOLK, *ss:*

Conrad Reno, as attorney for the plaintiff in this writ, before the service thereof, on oath declares that he verily believes the matter sought to be recovered in the action hereby commenced actually equals in amount or value the sum of four thousand dollars.

CONRAD RENO.

Subscribed and sworn to this ninth day of June, A. D. 1887, before me—

MILAN F. STEVENS,
Justice of the Peace.

6 Upon which writ are the following returns by the officers who served the same, viz:

SUFFOLK, *ss:*

BOSTON, *June 18th*, 1887.

By virtue of this writ I this day attached a chip as the property of the within-named Charles H. Bolles and George F. Wilde, and summoned them to appear at court, as within directed, by giving to each a summons in hand.

WM. D. MARTIN,
Deputy Sheriff.

Service & travel, $1.16.

MIDDLESEX, *ss:*

NEWTON, *June 20th*, 1887.

By virtue of this writ I this day attached a chip as the property of the within-named Francis D. Hall, and left a summons at his last and usual place of abode for his appearance to answer at court, as within directed.

Fees.

Service	50
Travel	64
	$1 14

SAM'L W. TUCKER,
Deputy Sheriff.

7 And upon the day on which said writ was returnable the plaintiff, upon entering the same, filed his declaration as follows, to wit:

Supreme Judicial Court, July Sitting, 1887.

SUFFOLK, *ss:*

WILLIAM T. EUSTIS
vs.
CHARLES H. BOLLES *et als.* } No. —.

Plaintiff's Declaration.

And the plaintiff says the defendants made a promissory note, payable to the plaintiff or order, a copy whereof, with the indorsements thereon, is hereto annexed, marked "A," and the defendants owe the plaintiff the balance of said note and interest thereon.

By his attorney, CONRAD RENO.

8 "A."

$16,000.00. BOSTON, MASS., *January 1st*, 1880.

On demand after date, for value received, we, the subscribers, of Boston, county of Suffolk and State of Massachusetts, promise to pay William T. Eustis or order sixteen thousand dollars at ——.

No. —. Due ——. B. CALLENDER & CO.

(Indorsed on back of note:) Rec'd interest to Jan. 1, 1886. W. T. Eustis. Rec'd int. to July 1, 1886. W. T. Eustis.

SUFFOLK, *ss:*

Court of Insolvency.

Proved against estate of Benjamin Callender & Co. and a dividend of 50 % declared thereon (said firm consisting of Chas. H. Bolles & Geo. F. Wilde).

9 This action was entered in our said supreme judicial court on the first Monday of July, A. D. eighteen hundred eighty-seven, when and where the parties appeared, and on the eleventh day of said July defendants Bolles and Wilde, by Richardson and Hale, Esquires, their attorneys, filed their answer as follows, to wit:

10 SUFFOLK, *ss:*

Supreme Judicial Court, July Sitting, 1887.

WILLIAM T. EUSTIS
vs.
CHARLES H. BOLLES *et als.* }

Answer of Charles H. Bolles & Geo. F. Wilde.

Now come the said defendants, Charles H. Bolles and George F. Wilde, and for answer deny each and every allegation in plaintiff's writ and declaration contained.

And, further answering, they say that on February 14, 1887, they filed their petition in insolvency in the insolvency court within and

for the county of Suffolk, and a warrant was duly issued thereon; that thereafter these defendants filed in said insolvency court a written proposal and offer for composition with all their joint creditors in accordance with the laws of this Commonwealth, which offer was afterwards assented to by the requisite number and value of all their joint creditors, and thereafter said composition was duly confirmed by said court, and all other proceedings were taken
11 as required by law to entitle the defendants to a discharge from all their joint debts and liabilities, and thereupon they did severally receive from said insolvency court a discharge from all their joint debts and liabilities, copies of the discharge of said defendants being hereto annexed and marked respectively "A" and "B."

And they say that if they ever made or signed the promissory note as alleged in said declaration they were wholly discharged from all liability thereon by virtue of their said discharge in the insolvency court as aforesaid.

By their att'ys, RICHARDSON & HALE.

12 Copy. "A."

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Court of Insolvency.

Seal of Court. To all persons to whom these presents shall come I, John W. McKim, Esquire, judge of the court of insolvency in and for the said county of Suffolk, send greeting:

Whereas it has been made to appear to me that Charles H. Bolles, of Boston, in said county, a member of the late firm of Benjamin Callender and Company, whose offer of composition with their joint creditors has been confirmed by said court and who have deposited in said court the money necessary for the payment of said composition, has in all things conformed himself to the requirements of law in that behalf made and provided, I do accordingly certify that said Charles H. Bolles is absolutely and wholly discharged from all his joint debts which have been or shall be proved and
13 are provable against his joint estate, and from all joint debts which are provable against his joint estate and which are founded on any contract made by said firm within this Commonwealth or to be performed within the same and made since the last day of July, in the year eighteen hundred and thirty-eight, and from all joint debts which are provable as aforesaid and which are founded on any contract made by said firm since that date and due to any persons who were resident within this Commonwealth on the fourteenth day of February, in the year one thousand eight hundred and eighty-seven, being the day of the first publication of the notice of the warrant issued for the seizure of the estate of said

Charles H. Bolles and said Benjamin Callender & Company, and from all demands against said firm for or on account of any goods or chattels wrongfully obtained, taken, or withheld by them, according to the provisions of chapter one hundred and fifty-seven of the Public Statutes and all acts in amendment thereof.

And I do further certify that the said Charles H. Bolles is by force of said chapter and of chapter 236 of the acts of the year
14 1884 and 353 of the year 1885 forever discharged and exempted from arrest or imprisonment in any suit or upon any proceeding for or on account of any debt or demand whatever which might have been proved against his joint estate, provided always that no debt created by the debtor's defalcation as a public officer, executor, administrator, guardian, receiver, trustee, or assignee of an insolvent estate, or by the fraud or embezzlement of the debtor, nor claim for goods attached on mesne process or taken on execution by the debtor as an officer or for misfeasance in office shall be hereby discharged.

Given under my hand and the seal of said court this thirty-first day of March, in the year one thousand eight hundred and eighty-seven.

(Signed) JOHN W. McKIM,
Judge of the Court of Insolvency.

15 "B."

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Court of Insolvency.

Seal of the Court. To all persons to whom these presents shall come I, John W. McKim, Esquire, judge of the court of insolvency in and for said county of Suffolk, send greeting:

Whereas it has been made to appear to me that George F. Wilde, of Boston, in said county, a member of the late firm of Benjamin Callender and Company, whose offer of composition with their joint creditors has been confirmed by said court, and who have deposited in said court the money necessary for the payment of said composition, has in all things conformed himself to the requirements of law in that behalf made and provided, I do accordingly certify that said George F. Wilde is absolutely and wholly discharged from all his joint debts which have been or shall be proved and are prov-
16 able against his joint estate, and from all joint debts which are provable against his joint estate and which are founded on any contract made by said firm within this Commonwealth or to be performed within the same, and made since the last day of July, in the year eighteen hundred and thirty-eight, and from all joint debts which are provable as aforesaid and which are founded on any contract made by said firm since that date and due to any persons who were residents within this Commonwealth on the four-

teenth day of February, in the year one thousand eight hundred and eighty-seven, being the day of the first publication of the notice of the warrant issued for the seizure of the estate of said George F. Wilde and said Benjamin Callender & Co., and from all demands against said firm for or on account of any goods or chattels wrongfully obtained, taken, or withheld by them, according to the provisions of chapter one hundred and fifty-seven of the Public Statutes and all acts in amendment thereof.

And I do further certify that the said George F. Wilde is by force of said chapter and of chapter 236 of the year 1884 and 353
17 of the year 1885 forever discharged and exempted from arrest or imprisonment in any suit or upon any proceeding for or on account of any debt or demand whatever which might have been proved against his joint estate, provided always that no debt created by the debtor's defalcation as a public officer, executor, administrator, guardian, receiver, trustee, or assignee of an insolvent estate, or by the fraud or embezzlement of the debtor, nor claim for goods attached on mesne process or taken on execution by the debtor as an officer, or for misfeasance in office shall be hereby discharged.

Given under my hand and the seal of said court this thirty-first day of March, in the year one thousand eight hundred and eighty-seven.

(Signed) JOHN W. McKIM,
Judge of the Court of Insolvency.

18 And on said eleventh day of July said defendant, Francis D. Hall, by his attorneys, Richardson and Hale, Esquires, also filed his answer as follows, to wit:

19 SUFFOLK, *ss:*

Supreme Judicial Court, July Sitting, 1887.

WILLIAM T. EUSTIS
vs.
CHARLES H. BOLLES *et als.*

Answer of Francis D. Hall.

Now comes the said defendant, Francis D. Hall, and for answer denies each and every allegation in plaintiff's writ and declaration contained.

He specially denies that he ever made or assigned the promissory note as alleged in said declaration, and he demands that the said alleged signature be proved by the plaintiff at the trial of this cause.

And, further answering, he says that at time of the alleged making of said note, on January 1, 1880, this defendant was not a member of the copartnership of the said firm of B. Callender & Co.

By his att'ys, RICHARDSON & HALE.

20 And on the tenth day of August, in said year, the plaintiff, by Conrad Reno, Esquire, his attorney, filed his demurrer to the joint answer of defendants Bolles and Wilde as follows, to wit:

21 SUFFOLK, *ss:*

Supreme Judicial Court, August Sitting, 1887.

WILLIAM T. EUSTIS
vs.
CHARLES H. BOLLES *et als.* } No. 3858.

Plaintiff's Demurrer to Joint Answer of Defendants Bolles and Wilde.

And now comes the plaintiff in the above-entitled cause and, demurring to that part of the joint answer of said defendants Bolles and Wilde which sets forth and relies upon as a defence to this action certain certificates of discharge under and pursuant to chapter 236 of the acts of the year 1884 and 353 of the year 1885 (commonly known as the composition acts) granted to said Bolles and Wilde by the insolvency court within and for the county of Suffolk, says that said part of said answer and the matters therein contained, in manner and form as the same are stated and set forth, are not sufficient in law to constitute a defence to this action, for that
22 said certificates of discharge are null and void as against this plaintiff and are no answer to this action, because the said composition acts are unconstitutional and void in the following particulars, to wit:

1. As applied to the promissory note in suit, which was made, executed, and delivered to said plaintiff prior to the passage of said composition acts, said acts impair the obligation of the plaintiff's contract, and are therefore in violation of that provision in the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts. Art. I, sect. 10.

2. Said composition acts are in violation of that part of the fourteenth amendment to the Constitution of the United States which declares that no State shall deprive any person of life, liberty, or property without due process of law. Sect. 1.

3. Said composition acts are in violation of that part of the constitution of Massachusetts which declares that "no subject shall be * * * deprived of his life, liberty, or estate but by the judgment of his peers or the law of the land." Declaration of Rights, article XII.

23 4. Said composition acts are not a "fair and ordinary" exercise of the power of a State to pass bankrupt or insolvent laws, and are therefore contrary to that part of the Constitution of the United States giving to Congress the power to establish "uniform laws on the subject of bankruptcy throughout the United States." Art. I, sect. 8.

5. Said composition acts are not "wholesome and reasonable laws," and are therefore contrary to art. IV, sect. 1, part the second, of the constitution of Massachusetts.

6. Said composition acts do not fall within the general scope of legislative power and authority, and they impose non-judicial functions upon the courts of insolvency.

Wherefore, for want of a sufficient answer, the plaintiff prays judgment.

By his attorney, CONRAD RENO.

I hereby certify that I am of opinion that there is such probable ground in law for the above demurrer as to make it a fit subject for judicial inquiry, and that the same is not intended for delay.

CONRAD RENO,
Plaintiff's Attorney.

24 Whereupon, on the twenty-second day of September, in said year, said defendants, by consent of plaintiff, filed their motion to amend their answer as follows, to wit:

25 SUFFOLK, *ss:*

Supreme Judicial Court, July Sitting, 1887.

WILLIAM T. EUSTIS
vs.
CHARLES H. BOLLES *et als.*

Motion to Amend the Answer of Defendants Bolles and Wilde.

Now come the said defendants, Bolles and Wilde, and move to amend their answer heretofore filed by substituting therefor the following:

Now come the defendants C. H. Bolles and George F. Wilde and for answer deny each and every allegation in plaintiff's writ and declaration contained.

And, further answering, they say that on February 14, 1887, they filed their petition in insolvency in the insolvency court within and for the county of Suffolk, and a warrant was duly issued thereon, and assignees were duly elected and an assignment of the estate of said insolvent debtors was duly made to said assignees.

26 That on February 16, 1887, the defendants filed in said insolvency court a written proposal and offer for composition with all their joint creditors, in accordance with the laws of this Commonwealth, which offer was afterwards assented to by the requisite majority in number and value of all their joint creditors, and thereafter said composition was duly confirmed by said court.

And all other proceedings were taken as required by law to entitle them to a discharge from all their joint debts and liabilities.

And thereupon they did severally receive from said insolvency court a discharge from all their joint debts and liabilities, copies of the discharge of said defendants being hereto annexed and marked respectively "A" and "B."

And they say that this plaintiff duly proved his claim upon said

note in said insolvency proceedings, and he afterwards, to wit, on May 14th, 1887, received and accepted the sum of $8,020, being the amount of the offer of composition as aforesaid.

And they say that if they ever made or signed the prom-
27 issory note, as alleged in said declaration, they were wholly discharged from all liability thereon by their said discharge in the insolvency court as aforesaid.

By their attorneys, RICHARDSON & HALE.

Which motion was allowed.

And at a hearing on the eleventh day of October, A. D. eighteen hundred eighty-seven, it was ordered by the court that the demurrer theretofore filed in this cause stand to the answer as amended; and thereupon it was ordered by the court that the demurrer be overruled; to which ruling and order the plaintiff excepted.

And afterwards, after a full hearing thereon, the case was reserved, upon the report of the presiding justice, for the consideration of the full court, and was thence continued unto the sixth day of March, A. D. eighteen hundred eighty-eight, when it was ordered by the supreme judicial court for the Commonwealth by its rescript as follows, to wit:

28 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, March, 1888.

In the case of William T. Eustis *vs.* Charles H. Bolles & *al.*, pending in the supreme judicial court for the county of Suffolk—

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz.:

Judgment for defendants.

By the court:

HENRY A. CLAPP, *Clerk.*

March 6, 1888.

29 Whereupon, on the twenty-second day of March, in the year last aforesaid, the plaintiff filed his notice of intention to apply to said supreme judicial court for the Commonwealth for a rehearing as follows, to wit:

30 WM. T. EUSTIS *vs.* CHARLES H. BOLLES *et als.* } No. 3858. Law.

BOSTON, *March* 22, 1888.

John Noble, Esq.

DEAR SIR: In the above-entitled cause, in which the full court, by its rescript filed on March 6, 1888, rendered judgment in favor of the defendants, the plaintiff intends as soon as possible to petition for a rehearing. For this reason the plaintiff requests that judg-

ment be not entered in the county court for the present until his petition has been acted upon by the full court.

Very truly yours, CONRAD RENO,
Att'y for Plaintiff.

31 Which application was overruled.

And on the third day of May, in said year eighteen hundred and eighty-eight, suggestion of the death of said plaintiff was entered as follows, to wit:

32 WM. T. EUSTIS
v.
CHARLES H. BOLLES *et als.* } 3858. Law.

The plaintiff in the above-entitled cause died on March 30, 1888.

CONRAD RENO,
Att'y for Pl'ff.

May 3, 1888.

33 And afterwards, to wit, on the twenty-fifth day of November, eighteen hundred eighty-nine, the executrices of said plaintiff filed their petition for leave to appear and prosecute said action as follows, to wit:

34 SUFFOLK, *ss:*

Supreme Judicial Court, October Term, 1889.

WILLIAM T. EUSTIS
v.
CHARLES H. BOLLES *et al.* } No. 3858.

To the honorable the justices of the supreme judicial court held within and for the county of Suffolk:

Respectfully represent Isabel B. Eustis and Florence D. Eustis, both of Springfield, in the county of Hampden and Commonwealth of Massachusetts, that the sole plaintiff in the above-entitled action departed this life on the thirtieth day of March, 1888, leaving a will in which your petitioners are named executrices; that on the second day of May, 1888, said will was duly proved and allowed and letters testamentary thereon issued to them by the probate court for said county of Hampden, and that said letters are in full force and virtue.

Wherefore your petitioners pray the leave of this court
35 to appear and prosecute said action as executrices or to be made parties plaintiff in the place of said William T. Eustis, deceased.

By their attorney, CONRAD RENO.

Upon which petition is endorsed the following:

We do not care to be heard upon the within motion.

RICHARDSON & HALE,
Att'ys for Defendants.

And said petition was thereupon allowed by the court.

36 And the following appearance was then entered for the plaintiffs, viz:

SUFFOLK, *ss:*

Supreme Judicial Court, ——, 1889.

ISABEL B. EUSTIS *et al.*, Exec., Pl'ff-,
vs.
CHARLES H. BOLLES *et al.*, D'f't-. } No. 3858.

In the above action I appear for plaintiffs.

CONRAD RENO.

SUFFOLK, *ss:*

Supreme Judicial Court.

Filed Nov. 25, 1889.
Attest: C. H. COOPER,
Ass't Clerk.

37 And on said twenty-fifth day of November said executrices, plaintiffs, also filed their motion for judgment as follows, to wit:

38 SUFFOLK, *ss:*

Supreme Judicial Court for the County of Suffolk, October Term, 1889.

ISABEL B. EUSTIS *et al.*, Executrices,
v.
CHARLES H. BOLLES *et als.*

Plaintiffs' Motion for Judgment.

Now come said plaintiffs and move that final judgment be entered for said defendants in this court in accordance with the rescript of the supreme judicial court for the Commonwealth.

By their att'y, CONRAD RENO.

Upon which motion is the following endorsement, to wit:

We do not care to be heard upon this motion.

RICHARDSON & HALE,
Att'ys for Def'ts.

39 Whereupon it was ordered that judgment be entered for the defendants.

It was therefore considered by our said supreme judicial court on the twenty-sixth day of November, A. D. 1889, that the said William T. Eustis his action against the said Chas. H. Bolles, George F. Wilde, and Francis D. Hall hath not maintained, and that the said Charles H. Bolles and George F. Wilde recover against the said William T. Eustis costs of suit, taxed at twenty-two dollars sixty-six cents, and that the said Francis D. Hall recover against the said William T. Eustis costs of suit, taxed at $28.31.

40 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said court to be hereto affixed.

Witness Marcus Morton, Esquire, chief justice of our said supreme judicial court, at Boston, this sixth day of February, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] JOHN NOBLE, *Clerk.*

41 The following is the assignment of errors:

42 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Supreme Judicial Court, January Sitting, 1890.

ISABEL B. EUSTIS and FLORENCE D. EUSTIS, as Executrices under the Will of William T. Eustis, Deceased,
v.
CHARLES H. BOLLES, GEORGE F. WILDE, and FRANCIS D. HALL.

Assignment of Errors.

Now come said Isabel B. Eustis and Florence D. Eustis, as executrices as aforesaid, and assign as errors in the record of the judgment and proceedings of said cause the following, to wit:

1. The court erred in holding that the certificates of discharge of said Bolles and Wilde under and pursuant to chapter 236 of the Acts of Massachusetts of the year 1884, and chapter 353 of the
43 year 1885 (commonly known as the "composition acts"), are a bar to this claim against them, and in not holding that said "composition acts" are in contravention of article I, section 10, of the Constitution of the United States, which ordains that no State shall pass any law impairing the obligation of contracts.

2. The court erred in holding that the plaintiffs' testator had, on the facts found and appearing of record, waived his right to object that said "composition acts" are unconstitutional and void under said contract clause of the Constitution of the United States, and that therefore the plaintiffs cannot recover against said Bolles and Wilde.

3. The court erred in holding that on the facts found and appearing of record the plaintiffs' testator had waived his right to show

that the decrees of discharge of said Bolles and Wilde, under and pursuant to said "composition acts," are void and no defence as against this claim, and in holding that said decrees of discharge are a bar to this claim against said Bolles and Wilde.

4. Said judgment is erroneous in that it holds and decides that said "composition acts" are not in contravention of that
44 part of section I of the fourteenth amendment to the Constitution of the United States which declares that no State shall deprive any person of life, liberty, or property without due process of law, and that the certificates of discharge under said acts obtained by said Bolles and Wilde are a bar to this claim against them.

5. Said judgment is erroneous in that it holds and decides that said "composition acts" are not in contravention to that part of article I, section 8, of the Constitution of the United States which declares that Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States, and that the certificates of discharge under said acts obtained by said Bolles and Wilde are a bar to this claim against them.

6. Said judgment is in contravention of article I, section 10, of the Constitution of the United States in that it reverses the established rule of construction applied to State insolvent laws in Massachusetts at the time when the testator of the plaintiffs accepted his dividend, to wit, that a creditor who accepts part of his debt in the form of a dividend under State insolvency proceedings does
45 not thereby waive his right to show the invalidity of the debtor's discharge in insolvency and can maintain a subsequent action for the unpaid balance of his demand if the discharge without such acceptance of a dividend would be no defence, and in that said judgment holds and decides that a creditor who accepts part of his debt in the form of a dividend under State insolvency proceedings does thereby waive his right to show the invalidity of the debtor's discharge in insolvency and cannot maintain a subsequent action for the unpaid balance of his demand, and that therefore the plaintiffs cannot recover against said Bolles and Wilde.

7. The court erred in holding that the plaintiffs are not entitled to recover on the facts found and appearing of record under the Constitution and laws of the United States.

By their attorney, CONRAD RENO.

Filed January 29, 1890.

46 The following is the opinion of the supreme judicial court for the Commonwealth :

47 WILLIAM T. EUSTIS
vs.
CHARLES H. BOLLES & Others.

SUFFOLK, *January* 24, 1888—*March* 6, 1888.

Present: Morton, C. J.; Devens, C. Allen, Holmes, & Knowlton, JJ.

Partnership — Dissolution — Bankruptcy of a partner — Notice — Evidence—Pleading—Insolvent debtor—Composition with creditors—Constitutional law—Election—Waiver.

The bankruptcy of a partner after a firm has dissolved is as effective notice of the dissolution to a creditor as if it had been caused by the bankruptcy.

Evidence of such bankruptcy to prove such notice is admissible in an action by the creditor against the partner, though not set up in the answer.

A creditor whose debt accrued before the passage of the St. of 1884, c. 236, as amended by the St. of 1885, c. 353, providing for compositions with creditors in insolvency, by accepting the benefit of such a composition waives his right to object that those statutes are void as to his debt as impairing the obligation of contracts.

Contract against Charles H. Bolles, George F. Wilde, and Francis D. Hall on a promissory note dated January 1, 1880, payable to the plaintiff or order, and signed by "B. Callender & Co." Writ
48 dated June 9, 1887. The answer of the defendant Hall was: 1. A general denial. 2. A special denial that he ever made or signed the note, with a demand that the signature be proved at the trial. 3. That on January 1, 1880, he was not a member of the firm of B. Callender & Co. The answer of the defendants Bolles and Wilde, as amended, was: 1. A general denial. 2. Certificates of discharge upon a composition with creditors under the St. of 1884, c. 236, as amended by the St. of 1885, c. 353. The plaintiff demurred to the answer of the defendants Bolles and Wilde on the ground that those statutes were unconstitutional and void for the reason, among others, that they impaired the obligation of contracts.

At the trial in this court, without a jury, C. Allen, J., overruled the demurrer and reported the case for the consideration of the full court. The facts appear in the opinion.

C. Reno, for the plaintiff.
J. B. Richardson, for the defendants.

MORTON, *C. J.:*

This is a suit upon a note dated January 1, 1880, signed by "B. Callender & Co." It was signed and delivered to the plaintiff by B. Callender, and at that time the only parties composing the firm

were the said Callender and the defendants Bolles and Wilde. The defendant Hall, who was formerly a partner, had withdrawn from the firm on July 2, 1877, and notice of the dissolution was given by publication in the Boston Daily Advertiser, but no personal notice was given to the plaintiff. The note in suit was given in renewal of a former note which the plaintiff held at the time of the dissolution.

It further appears that the defendant Hall, in December, 1877, filed his petition in bankruptcy, was adjudicated a bankrupt, and thereupon, in June, 1878, received his discharge.

Upon these facts we are of the opinion that the defendant Hall is not liable in this action. The only ground upon which he could be held is that the plaintiff had no legal notice of the dissolution of the firm. If the firm had not been previously dissolved the bankruptcy of Hall would have dissolved it. The bankruptcy, like the death of a partner, dissolves the partnership; and, as it is a public and notorious proceeding, all creditors are bound to take notice of it and no further notice need be given. The publication of
49 bankruptcy or insolvency proceedings is legal notice to all persons by which they are bound. Story, Part., §§ 332–336; Arnold *v.* Brown, 24 Pick., 89, 94; Marlett *v.* Jackman, 3 Allen, 287; Butler *v.* Mullen, 100 Mass., 453.

The plaintiff was a creditor of Hall at the time of his bankruptcy; he is presumed to have had notice of it, and this is notice that at that time the partnership had been dissolved. It is as effective notice that the old copartnership no longor existed as it would be if the bankruptcy itself had worked the dissolution.

The plaintiff objects that evidence of the bankruptcy is not admissible under the pleadings, but the fact is put in evidence, not as a bar to the plaintiff's claim, but as evidence that he had notice of the dissolution, and therefore need not be set up in the answer. We are therefore of opinion that the defendant Hall is entitled to judgment.

The defendants Bolles and Wilde rely upon discharges under our insolvent law. Their discharges were obtained under the St. of 1884, c. 236, as amended by the St. of 1885, c. 353. These statutes made a material change in our insolvent laws. Before they were enacted an insolvent debtor was obliged to surrender all his property which was not exempt from attachment to his assignee for distribution among his creditors, and he was entitled to a discharge if he paid fifty per cent. of the debts proved, or if he paid less than that by procuring the assent in writing of a majority in number and value of his creditors who had proved their claims, to be filed within six months after the date of the assignment. Pub. Sts., c. 157. Under the composition statutes he may, after his petition and schedules are filed, instead of following the further proceedings of the Public Statutes, c. 157, file "a written proposal for composition with his creditors," setting forth the amount he offers and the times of payment. If he offers fifty per cent. or more, he must obtain the written assent of a majority in number and value of all his known creditors to the proposal; if he offers less than fifty per cent., of three-fourths in number and value of such creditors; and thereupon the court may

order that the composition be confirmed and the amount offered be paid into court. Upon such payment the court shall grant to the debtor a certificate of discharge from his debts. The debtor
50 retains all his property except what is paid into court. The money paid into court is to be paid out by the register to those entitled to it, and if any part is not called for within a year by any creditors it is, after notice to such creditors, to be paid over to the debtor or to the person who deposited it. This is a general outline of the two methods of proceeding.

We assume, in favor of the plaintiff, that the composition statutes above cited, as they undertake to discharge debts due to creditors upon conditions materially different from those existing prior to the time of their passage, are as to such prior creditors unconstitutional, as impairing the obligation of their contracts; but they are not wholly unconstitutional and void. They are clearly valid as to all debts between citizens of the State which accrue after the statutes went into effect; and a prior creditor, if he elects to avail himself of the composition proceedings and to accept their benefits, may waive his right to object that they are invalid as to his debt. The principal question in this case is whether the plaintiff has thus waived his rights.

He proved his debt in insolvency and voted for assignee; but this he had a right to do, as the proceedings were commenced under the public statutes, and if they had been pursued according to these statutes his debt would have been discharged and he would have been entitled to his share of the debtor's property. After the composition was proposed, at a hearing thereon on March 10, 1887, he objected to it on the ground that the composition statutes were unconstitutional and void as to his debts. So far, it is clear that there was no waiver of his rights. But it further appears that on May 14, 1887, the plaintiff received the sum of $8,020, being fifty cents on the dollar of his claim, and gave a receipt reciting that it was "according to the composition confirmed by the court in the case," being like the receipts signed by all the other creditors; he thus voluntarily received all the benefits and fruits of the composition. We think that when the composition was confirmed he was put to his election whether he would avail himself of the composition offer or would reject it and rely upon his right to enforce his debt against the debtors, notwithstanding their discharge.

The offer was to pay him fifty per cent. not in part payment
51 of his debt, but in full discharge of it. The offer may be an amount larger than could be realized from the debtor's assets if administered in insolvency. The statute contemplates that the money offered may be, and it often is, in fact, paid into court by the debtor's friends, and in such case it is paid over to the person who deposited it if not called for within a year by any of the creditors. It is clearly a violation of the whole purpose and spirit of the composition for any creditor of the insolvent to draw out his share of the money and apply it in part payment of his debt, holding the insolvent liable for the balance. It is unjust to the person who deposited the money. As the plaintiff saw fit to accept the

offer, he thus made himself a party to the composition, and such acceptance was inconsistent with the right to enforce the balance of his debt in violation of the terms of the composition. We are of opinion that he has waived his right to object that the discharge is invalid as to him.

A similar question was decided in Clay *v.* Smith, 3 Pet., 411, where it was held that the plaintiff, by proving his debt and taking a dividend under the bankrupt laws of Louisiana, waived his right to object that the law did not apply to his debt, he being a creditor residing in another State.

The plaintiff relies upon the cases of Kimberly *v.* Ely, 6 Pick., 440, and Agnew *v.* Platt, 15 Pick., 417. The last-named case was, as is stated by Chief Justice Shaw in Beal *v.* Burchstead, 10 Cush., 523, "decided on the ground that the defendant was not an inhabitant or citizen of New York and had no right to avail himself of the State insolvent law of that State." The case of Kimberly *v.* Ely more nearly resembles the case of the plaintiff; but in regard to both of these cases it must be said that, so far as they uphold the doctrine that a foreign creditor who voluntarily proves his debt and receives his dividend in insolvency proceedings before a court of competent jurisdiction is not barred by the discharge, they are in conflict with the later decisions. The accepted doctrine now is that such creditors waive their right to object that as to their debt the law is unconstitutional, and the same rule applies *a fortiori* to a citizen of this State who elects to prove his debt contracted before the law took effect, and receives all the benefits of the law. Bige-
52 low *v.* Pritchard, 21 Pick., 169, 174; Fisher *v.* Currier, 7 Met., 424; Gilbert *v.* Hebard, 8 Met., 129; Clark *v.* Hatch, 7 Cush., 455; Marsh *v.* Putnam, 3 Gray, 551, 565.

We are, therefore, of the opinion that the discharges of the defendants Bolles and Wilde are a bar to the plaintiff's claim against them.

Judgment for the defendants.

53 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *February* 6, 1890.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Eustis *vs.* Bolles, decided on the sixth day of March, 1888, and reported in 146 Mass., 413.

WILLIAM V. KELLER,
Reporter of Decisions.

54 The following is the report to the full court by the justice before whom the case was heard:

55 SUFFOLK, *ss:*

Supreme Judicial Court. Common Law, 1887.

WILLIAM T. EUSTIS
vs.
CHARLES H. BOLLES, GEORGE F. WILDE, and FRANCIS D. HALL.

This is an action of contract to recover the balance of a promissory note, dated January 1st, 1880, signed "B. Callender & Co.," and was heard by the court without a jury.

The pleadings are made a part thereof. The court, without hearing any argument thereon, the question raised being a constitutional one, overruled the plaintiff's demurrer, and the plaintiff excepted thereto.

I find that the note in suit was signed and delivered to the plaintiff on January 1st, 1880, by Benjamin Callender.

At that time the only persons who composed said firm of "B. Callender & Co." were said Benjamin Callender and the defendants Bolles and Wilde. Said Callender died in January, 1887.

56 The defence of said Bolles and Wilde to said action was a composition with their creditors, and their discharge under the "composition acts," so called, being ch. 236 of the Acts of 1884, and ch. 353 of the Acts of 1885, set forth in their answers and in their certificates of discharge thereto annexed.

The defence of the defendant Hall was that he did not sign said note and was not a member of said firm of B. Callender & Co. at the time it was given.

It appeared that the said Hall had formerly been a partner with said Callender, Bolles, and Wilde for ten years (at least) prior to July 2, 1877, but that on said July 2, 1877, said copartnership was dissolved by mutual agreement, a notice of which dissolution was published in the Boston Daily Advertiser on July 7, 1877, and also on every week day during the remainder of that month of July, 1877.

The notice was inserted under the head of "Copartnership notice" and was as follows:

"The copartnership heretofore existing between the undersigned, under the firm name of 'B. Callender & Co.,' is this day dissolved by the withdrawal of Francis D. Hall.

(Signed) B. CALLENDER.
FRANCIS D. HALL.
CHARLES H. BOLLES.
GEO. F. WILDE.

Boston, July 2, 1887."
(1877.)

57 I find that said Hall did then withdraw from said firm and never had any connection with or interest in said firm of B. Callender & Co. after July 2, 1877.

In answer to questions put to the plaintiff by his counsel he was allowed to testify, against the defendant Hall's objection and exception, that when the plaintiff took the note in suit, on January 1, 1880, "he believed said Hall was still a member of said firm at that time, and that at the time he took said note in suit he believed the firm to be composed of the same persons who had formerly made it worthy of credit and in reliance upon their responsibility," and said he so believed for the reason that he knew said Hall had been a member of it in 1876 and before, and that he had never received any actual notice of his withdrawal therefrom, and that this was the only reason, and I find that this was the only reason which he had for so believing. If these questions and answers are competent, I find that the things stated in the plaintiff's said answers are true.

I also find that the note in suit was given in part payment or renewal of a note which was dated about 1870 and was given
58 by said firm of B. Callender & Co. while said Hall was a member of it for money loaned to that firm. Interest was paid monthly on the earlier note to the plaintiff for several years prior to said Hall's withdrawal from said firm, in 1877.

Upon his cross-examination it appeared and I find that the plaintiff had never at any time since July 2, 1877, had any conversation with said Hall himself as to his being a member of said firm or as to his financial condition; that when he took the note in suit he made no inquiry as to whether said Hall was a member of the firm or not or as to said Hall's property or financial condition.

It did not appear that said Hall had ever held himself out as or in any way represented himself to be a member of said firm since July 2, 1877. It appeared that the plaintiff was a clergyman, residing in Springfield since 1869.

It appeared that in December, 1877, the defendant Hall filed his petition in bankruptcy under the laws of the United States and was adjudicated a bankrupt thereon, and that thereafter due proceedings were had according to said laws, so that in June, 1878, he
59 received his discharge under the said laws of the United States "from all debts provable against his estate at the time of his filing said petition." This evidence of the defendant Hall's proceedings and discharge in bankruptcy was admitted against the plaintiff's objection and exception as being inadmissible under the pleadings. Said Hall has never made any payment on the note in suit. I find that he did not sign said note in suit, nor did he authorize the making or giving the same.

As to the defendants Bolles and Wilde, I find that on February 14, 1887, they filed their petition in insolvency as surviving members of said firm of B. Callender & Co. in the insolvency court within and for the county of Suffolk; that on February 16, 1887, said defendant filed in said court a written proposal for composition with their copartnership (B. Callender & Co.) creditors under said composition acts of 1884 and 1885, proposing to pay fifty cents on the dollar of their debts in money; that on February 24, 1887, pursuant to due notice, as provided by the statute, the first meetings of

creditors were held in both the ordinary insolvency proceedings and in the composition proceedings; that the plaintiff proved
60 his claim and voted for assignees. The debtors duly filed in said court the assent in writing of a majority in number and *the* value of their creditors to said proposal, who proved their claims. The first adjourned hearing in the composition proceedings was held on March 10, 1887, in said insolvency court, pursuant to due notice, to determine whether said composition should be confirmed; that on the same tenth day of March, 1887, and after a hearing, in which the plaintiff took part, in opposition to the confirmation of composition, said insolvency court confirmed the composition, and the debtors duly deposited in the court the money for the payment of the creditors, and on March 31st, 1887, granted to said defendants certificates of discharge under and pursuant to the composition acts aforesaid, copies of which certificates are annexed to the answers; that on May 14, 1887, the plaintiff received the sum of $8,020, being fifty cents on the dollar of his claim, and gave a receipt reciting that it was "according to the composition confirmed by the court in the case." All the other creditors of said Bolles and Wilde have accepted the offer and signed similar receipts.

61 The plaintiff was allowed to put in evidence tending to show, against the objection and exception of the defendants Bolles and Wilde, and if such evidence is competent I find, that prior to the filing of their offer for composition he was asked to accept said offer of fifty cents on the dollar, but declined so to do; that the plaintiff instructed his counsel to oppose the discharges of said Bolles and Wilde under said composition acts, and that his counsel did oppose their discharges under said acts at the first adjourned hearing in the composition proceedings held on March 10, 1887, in said insolvency court, and on the same day filed in said court certain written objections to the discharge of said Bolles and Wilde under said composition acts on the ground that said acts are unconstitutional and void. A certified copy of said objections is hereto annexed, marked "A." All the proceedings of the said composition were regular, according to the statute.

The only reply or ground of objection made by the plaintiff to the validity of the defence of composition was the uncon-
62 stitutionality of the said "composition acts" on the grounds set forth in his said demurrer to said answers.

I thereupon report the case for the determination of the full court.

CHARLES ALLEN, *J. S. J. C.*

63 A.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss*:

MARCH 10, 1887.

Insolvency Court.

Benjamin Callender and Company, insolvent debtors. No. 1347.

Objections to Discharge of Debtors under the Composition Acts of 1884 *and* 1885.

And now come the creditors, whose names are hereto subscribed, and object that said debtors are not entitled to a discharge from their debts under and by virtue of Statute of 1884, c. 236, and Statutue of 1885, c. 353, because said creditors say that said statutes are unconstitutional and void upon the following grounds, to wit:

1. Because said statutes are in violation of that part of the fourteenth amendment to the Constitution of the United States which provides that no State "shall deprive any person of life, liberty, or property without due process of law."

64 2. Because said statutes as applied to the claim of William T. Eustis, which is in the form of a promissory note, and was executed by said debtors and delivered to said Eustis before the passage of said statutes, are in violation of that part of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of contracts.

Signatures.	Amount of claim.
1. William T. Eustis, } by their att'y, Conrad Reno.	$16,040 00
2. Eliot, Barnes & Co., } by their att'y, Conrad Reno.	5 63
3. Eliza F. Ashton, by her att'y, Robert Codman, Jr.	28,653 66
	$44,699 29

Copy.
Attest: JOHN H. PAINE, [SEAL OF COURT.]
Ass't Reg'r.

65 The following is the original citation and acknowledgment of service:

66 THE UNITED STATES OF AMERICA:

Commonwealth of Massachusetts to Charles H. Bolles and George F. Wilde, both of Boston, in the said Commonwealth, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error

filed in the clerk's office of the supreme judicial court of the Commonwealth of Massachusetts, wherein Isabel B. Eustis and Florence D. Eustis, as executrices under will of William T. Eustis, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Marcus Morton, chief justice of the supreme judicial court of Commonwealth of Massachusetts, this twenty-ninth day of January, in the year of our Lord one thousand eight hundred and ninety.

MARCUS MORTON,
Ch. Justice Sup. J'l Court.

BOSTON, MASS., *Jan.* 29, 1890.

Service of this citation is hereby accepted by the defendants in error.

RICHARDSON & HALE,
Att'ys for Defendants in Error.

[Endorsed:] Returned into court and filed January 29, 1890. Att.: John Noble, clerk.

67 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Supreme Judicial Court.

I, John Noble, clerk of said court, hereby certify that the foregoing are true copies of—

I. The record in the case of—

WILLIAM T. EUSTIS, Plaintiff (ISABEL B. EUSTIS and FLORENCE D. EUSTIS, Executrices under the Will of William T. Eustis), *against* CHARLES H. BOLLES, GEORGE F. WILDE, FRANCIS D. HALL, Defendants.

II. The assignment of errors.

III. The opinion of the supreme judicial court for the Commonwealth, annexed to and transmitted with the record.

IV. The report to the full court by the justice before whom the case was heard, annexed to and transmitted with the record,
68 and of all the proceedings in said case, with all things concerning the same, together with the original citation and the acknowledgment of service thereon.

[SEAL.] In witness whereof I have hereunto set my hand and affixed the seal of said court this sixth day of February, A. D. 1890.

JOHN NOBLE, *Clerk.*

69 (*Bond on Writ of Error.*)

Know all men by these presents that we, Isabel B. Eustis and Florence D. Eustis, both of Springfield, in the county of Hampden and Commonwealth of Massachusetts, as executrices under the will of William T. Eustis, late of said Springfield, deceased, as principals, and Fred'k S. Bailey and Edward C. Southworth, both of said Springfield, as sureties, are held and firmly bound unto Charles H. Bolles and George F. Wilde, both of Boston, in the county of Suffolk and said Commonwealth, and Francis D. Hall, of that part of Newton known as Newtonville, in the county of Middlesex and Commonwealth aforesaid, late copartners, and doing business in said Boston under the firm name of Benjamin Callender and Company, in the full and just sum of four hundred ($400) dollars, to be paid to the said Charles H. Bolles, George F. Wilde, and Francis D. Hall, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the tenth day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a term or sitting of the supreme judicial court held within and for the county of Suffolk, in the Commonwealth of Massachusetts, in a suit depending in said court between said Isabel B. Eustis and Florence D. Eustis, as executrices as aforesaid, plaintiffs, and said Charles H. Bolles, George F. Wilde, and Francis D. Hall, defendants, in an action of contract, judgment was rendered against the said Isabel B. Eustis and Florence D. Eustis, as executrices as aforesaid; and the said Isabel B. Eustis and Florence D. Eustis, as executrices as aforesaid, having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles H. Bolles, George F. Wilde, and Francis D. Hall, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Isabel B. Eustis and Florence D. Eustis, as executrices as aforesaid, shall prosecute their said writ of error to effect and answer all costs

if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

ISABEL B. EUSTIS, [L. S.]
FLORENCE D. EUSTIS, [L. S.]
As Executrices under the Will of William T. Eustis, Deceased.
FRED'K S. BAILEY, [L. S.]
E. C. SOUTHWORTH, [L. S.]
Sureties.

Signed, sealed, and delivered in presence of—
W. M. WILLARD,
As to I. B. E., F. D. E., and F. S. B.
C. H. SOUTHWORTH.

Approved:
MARCUS MORTON,
Ch. J. Sup. Jud. Court.

[Endorsed:] 3858. Eustis *v.* Bolles *et al.* Notice of the time and place of hearing relative to the sufficiency of the sureties on the within bond is hereby waived. Richardson & Hale, att'ys for defendants. Copy.

Endorsed on cover: Case No. 13,969. Massachusetts supreme judicial court. No. 311. Isabel B. Eustis and Florence D. Eustis, as executrices of William T. Eustis, deceased, plaintiffs in error, *vs.* Charles H. Bolles and George F. Wilde. Filed February 17, 1890.

SUPREME COURT OF [redacted]

OCTOBER [redacted]

[redacted]

ISABEL B. EUSTIS AND [redacted]
EXECUTRICES OF WILLIAM T. [redacted]

[redacted]

vs.

CHARLES H. BOLLES AND GEORGE F. WILDE.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR PLAINTIFFS IN [redacted]

WM. A. MACLEOD,
CONRAD [redacted],
For Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM NO. 311.

ISABEL B. EUSTIS AND FLORENCE D. EUSTIS, AS EXECUTRICES OF WILLIAM T. EUSTIS, DECEASED,

Plaintiffs in Error.

vs.

CHARLES H. BOLLES AND GEORGE F. WILDE.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This was an action of contract brought to recover the balance due on a promissory note, of the following tenor: —

"$16,000.00. BOSTON, MASS., January 1st, 1880.
On demand after date, for value received, we, the subscribers, of Boston, county of Suffolk and State of Massachusetts, promise to pay William T. Eustis or order, sixteen thousand dollars at .
No. . Due .
B. CALLENDER & Co." (Record, p. 4)

The action was originally brought by the payee of the note, William T. Eustis (Record, p. 2); and after his death, it was prosecuted by his executrices, the present plaintiffs in error. (Record, pp. 11, 12.) The note was signed and delivered to the payee on January 1, 1880 (Record, p. 19), and represented money loaned to the firm of B. Callender and Company. (Record, p. 20.) At that time the only persons who composed that firm were Benjamin Callender, who died in January, 1887, and the defendants in error, Charles H. Bolles and George F. Wilde. (Record, p. 19.) On February 14, 1887, said Bolles and Wilde filed their petition in insolvency as surviving members of the firm of B. Callender & Co.; on February 16, 1887, they filed in the same insolvency court a written proposal for composition with their copartnership creditors, under the so-called "composition acts" of 1884 and 1885, being chapter 236 of the Acts of Massachusetts for the year 1884, and chapter 353 of the Acts of the year 1885; and they therein proposed to pay fifty cents on the dollar of their debts in money. (Record, p. 20.)

A short time prior to the filing by Bolles and Wilde of their offer for composition, the original plaintiff was asked to accept their offer of fifty cents on the dollar in full satisfaction, but declined so to do; and the plaintiff instructed his counsel to oppose the discharges of Bolles and Wilde under the composition acts. (Record, p. 21.)

On February 24, 1887, the first meetings of creditors were held in both the ordinary insolvency proceedings, which were begun on February 14, 1887, and in the composition proceedings, which were begun on February 16, 1887; and the original plaintiff proved his claim and voted for assignees in the ordinary insolvency proceedings (Record, pp. 20, 21); but the record does not show that he proved his claim in the composition pro-

ceedings. On March 10, 1887, the first adjourned hearing in the composition proceedings was held in the insolvency court, to determine whether said proposal for composition should be confirmed; and the original plaintiff appeared by counsel at said hearing and opposed the confirmation of said proposal, and opposed the granting of a discharge under said composition acts to said Bolles and Wilde, on the ground that said acts were unconstitutional and void. (Record, p. 21.) At the same hearing he and two other creditors filed certain written objections to the debtor's discharge (Record, p. 21), in which the composition acts were alleged to be unconstitutional, chiefly on the ground that those acts "as applied to the claim of William T. Eustis, which is in the form of a promissory note and was executed by said debtors and delivered to said Eustis before the passage of said statutes, are in violation of that part of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of contracts." (Record, p. 22.) These objections to the discharge were signed by three creditors, whose demands aggregated $44,699.29. (Record, p. 22.)

The debtors, Bolles and Wilde, having filed in the insolvency court the written assent of a majority in number and value of their creditors who had proved their claims to the proposal in composition, and having deposited in court one-half the aggregate amount of their debts, the court on March 10, 1887, confirmed the composition, and on March 31, 1887, granted to said Bolles and Wilde certificates of discharge under and pursuant to the composition acts. (Record, p. 21.) On May 14, 1887, the original plaintiff received the sum of $8020, being one-half the amount of his claim, and signed a receipt therefor, reciting that it was "according to the composition confirmed by the court in the case." (Record, p. 21.) On June 9, 1887, this action was brought in the Supreme Judicial Court to recover the unpaid bal-

ance due on the note. (Record, p. 2.) The declaration contained a count for this balance, giving the defendants credit for the fifty per cent received. (Record, p. 4.) The answer of the defendants, Bolles and Wilde, set up in defence their discharges under the composition acts aforesaid. (Record, pp. 4, 9.) The plaintiff demurred to this answer on the ground that the composition acts are unconstitutional and void, chiefly because they impaired the obligation of his contract. The trial court overruled the plaintiff's demurrer, and made a finding of facts, and reported the case for the determination of the full court. (Record, pp. 19, 21.) The original plaintiff died on March 30, 1888, and on November 25, 1889, his executrices were granted leave to appear and prosecute said action, and were made parties plaintiff in the place of said William T. Eustis, deceased. (Record, pp, 11, 12.) On November 25, 1889, final judgment was entered for the defendants (Record, p. 13), and on January 29, 1890, this writ of error was allowed as to Bolles and Wilde by Hon. Marcus Morton, Chief Justice of the Supreme Judicial Court (Record, p. 1), and on the same day it was returned into court and filed (Record, p. 23), and also on the same day the plaintiffs in error filed their assignment of errors. (Record, pp. 13, 14.) Francis D. Hall was originally joined as a party defendant (Record, p. 2), but as no Federal question was involved in the case against him, this writ of error was disallowed as to him. (Record, p. 1.)

ASSIGNMENT OF ERRORS.

The errors relied upon are the following: —

1. The court erred in holding that the certificates of discharge of said Bolles and Wilde under and pursuant to chapter 236 of the Acts of Massachusetts of the year

1884, and chapter 353 of the year 1885 (commonly known as the "composition acts"), are a bar to this claim against them, and in not holding that said "composition acts" are in contravention of Article I., Section 10, of the Constitution of the United States, which ordains that no State shall pass any law impairing the obligation of contracts.

2. The court erred in holding that the plaintiffs had, on the facts found and appearing of record, waived the right to object that said "composition acts" are unconstitutional and void under said contract clause of the Constitution of the United States, and that therefore the plaintiffs cannot recover against said Bolles and Wilde.

3. The court erred in holding that on the facts found and appearing of record, the plaintiffs had waived the right to show that the decrees of discharge of said Bolles and Wilde under and pursuant to said "composition acts," are void and no defence as against this claim; and in holding that said decrees of discharge are a bar to this claim against said Bolles and Wilde.

ARGUMENT.

I.

This court has jurisdiction.

The question of Federal law was specially set up or claimed by the original plaintiff in the proper mode and at the right time. His immunity from the operation of the composition acts was claimed by him at the first adjourned hearing in the composition proceedings held in the insolvency court on March 10, 1887, on the express ground that the composition acts impaired the obligation of his contract. (Record, pp. 21, 22.) In the court of original jurisdiction, this immunity was specially set up by demurrer to the answer of defendants Bolles and Wilde, on the same and other grounds. (Record, p. 8.) This demurrer was overruled by that

court, and the plaintiff excepted thereto. (Record, p. 19.) Trial by jury had been waived, and a single justice heard the evidence, and reported the case for the determination of the full court. (Record, pp. 19, 21.) At the argument before the full court the same Federal questions were insisted upon by the plaintiff. (Record, p. 17.). The Federal question stood in the very front of the litigation, and was necessarily involved in the decision of the case. It was the only question raised by the pleadings, and it was of a controlling character.

The court below, assuming that the composition acts impaired the obligation of the contract in suit, justified such impairment by the application of the principles of waiver to the facts of the case, and held that the plaintiff, by accepting under protest his dividend of fifty per cent, had waived his constitutional right of immunity from the operation of the composition acts. (Record, pp. 17, 18.)

When a State court of last resort justifies its refusal, neglect or failure to decide in favor of a Federal right, title, privilege, or immunity which is specially set up or claimed in the proper way and at the right time, by the application of some general rule of law to the facts of the case, such as waiver, estoppel, or acquiescence, its judgment is reviewable by this court on writ of error. If, in the opinion of this court, the justification assigned by the State court is well grounded, the State judgment will be affirmed. But if, in the opinion of this court, the justification is not well grounded, the aggrieved party is entitled to the benefit of the Federal law, and the State judgment will be reversed if a correct decision of the Federal question requires such reversal.

Given *v.* Wright, 117 U. S. 648, 655-656;
Huntington *v.* Attrill, 146 U. S. 657;

Des Moines Navigation Co. *v.* Iowa Homestead Co., 123 U. S. 552;
Green *v.* Van Buskirk, 5 Wall. 307, and 7 Wall. 139;
Railroad Co. *v.* Koontz, 104 U. S. 5;
Renaud *v.* Abbott, 116 U. S. 277;
Chapman *v.* Goodnow, 123 U. S. 540, 548.

In Given *v.* Wright, 117 U. S. 648, a person claimed that his land was exempt from taxation, and that a Statute of New Jersey which imposed a tax upon it, impaired the obligation of his contract and was void. In 1812 this court so decided the question in New Jersey *v.* Wilson, 7 Cranch, 164. For about sixty years after this decision the owners of the land continued to pay taxes without objection, and the State courts held that this was such an acquiescence in the imposition of taxes as to raise a conclusive presumption that, by some convention with the State, the right to exemption was surrendered. State *v.* Wright, 12 Vroom (41 N. J. L.), 478; S. C., 14 Vroom, 455. It was held that this court had jurisdiction, and in delivering the opinion, Mr. Justice Bradley says: — "The question, then, will be, whether the long acquiescence of the land owners under the imposition of taxes, raises a presumption that the exemption, which once existed, has been surrendered. This question, by itself, would be a mere question of State municipal law, and would not involve any appeal to the constitution or laws of the United States. But where it is charged that the obligation of a contract has been impaired by a State law, as in this case by the general tax law of New Jersey as administered by the State authorities, and the State courts justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the party

is entitled to the benefit of the constitutional protection." (Pp. 655-656.) The court then proceeded to examine the question of acquiescence, and, as this matter was well grounded, the judgment was affirmed.

In Huntington *v.* Attrill, 146 U. S. 657, a creditor of a New York corporation brought suit in a Maryland court to enforce a New York judgment, fixing the liability of the defendant as a director in the corporation under a New York statute. The Maryland court justified its refusal to enforce the New York judgment on the ground that the liability imposed by the New York statute was in the nature of a penalty, and was therefore not entitled to extra-territorial effect. Attrill *v.* Huntington, 70 Md. 191. This court held that it had jurisdiction to review the State judgment; and, being of opinion that the liability was not a penalty and that the New York judgment was entitled to full faith and credit, it reversed the judgment of the Maryland court. In the language of Mr. Justice Bradley, as the Maryland court justified its refusal to give full faith and credit to the New York judgment by the application of the general rule that penal laws are not entitled to extra-territorial effect, this court had jurisdiction to review the State judgment, and as the justification assigned by the State court was not well grounded, the aggrieved party was entitled to the benefit of the constitutional protection. Mr. Justice Gray, in delivering the opinion of the court in Huntington *v.* Attrill, expresses the same idea in these words: — "If a suit to enforce a judgment rendered in one State, and which has not changed the essential nature of the liability, is brought in the courts of another State, this court, in order to determine, on writ of error, whether the highest court of the latter State has given full faith and credit to the judgment, must *determine for itself* whether the original cause of action is penal in the international sense. The case in this regard is anal-

ogous to one arising under the clause of the constitution which forbids a State to pass any law impairing the obligation of contracts," etc. (Pp. 683–684.)

In Des Moines Navigation Co. *v.* Iowa Homestead Co., 123 U. S. 552, the State court of Iowa justified its refusal to consider or decide a Federal question on the ground that the point had not been presented in the brief of the party in whose favor it operated, and it held that a former judgment of a Federal court pleaded in defence could not avail the defendant. (63 Iowa, 285.) This court held that it had jurisdiction to review the Iowa judgment, and it reversed the judgment, as a correct decision of the Federal question required a reversal.

In Railroad Co. *v.* Koontz, 104 U. S. 5, the Supreme Court of Appeals of Virginia justified its refusal to allow a Maryland corporation to remove a suit brought against it in a State court by a citizen of Virginia, on two grounds: (1) that, by taking a lease of and operating a railroad in Virginia, the corporation became a Virginia corporation; and (2) that the corporation had, by its failure to enter the record and docket the cause in the Circuit Court of the United States on the first day of the next term, waived its right to a removal. This court held that it had jurisdiction, and, being of opinion that the justification assigned by the State court was not well grounded, it reversed the decision of that court.

In Chapman *v.* Goodnow, 123 U. S. 540 at 548, Mr. Chief Justice Waite, for the court, says: — "We are aware that a right or immunity set up or claimed under the constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment

which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of Sec. 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

II.

WAIVER.

A creditor whose demand is saved from the operation of a State statute or of a State decree by the Constitution of the United States does not waive the benefit of this constitutional immunity by accepting the part of his demand which the State statute or decree says shall constitute full satisfaction; and, there being no other defence, he is entitled to recover the unpaid balance of the debt.

Embry *v.* Palmer, 107 U. S. 3;
Kimberly *v.* Ely, 6 Pick. 440;
Montague *v.* Massey, 76 Va. 307;
Woodbridge *v.* Wright, 3 Conn. 523;
Douglass *v.* Craig, 13 So. Car. 371.

See also,

Insurance Co. *v.* Morse, 20 Wall. 445 (reversing Morse *v.* Home Ins. Co. 30 Wis. 496);
Barron *v.* Burnside, 121 U. S. 186;
Railroad Co. *v.* Maryland, 21 Wall. 456.

It appears that, during the entire pendency of the composition proceedings, the plaintiff's whole course of conduct was one of opposition and protest. He declined to accept the offer when first made, and he opposed the granting of the discharges. It was not until after the court had granted certificates of discharge

that the plaintiff accepted a dividend. At that time the money was lying idle in the court of insolvency, and, if the plaintiff had not accepted it, it would have been returned to the debtors after the expiration of one year from the time of its deposit, according to the provision of section 5 of the composition act of 1885, which is quoted in Part III. of this brief. Unless he accepted it within that time the plaintiff might have lost the whole of his demand. Believing that "half a loaf was better than no bread," he accepted the half. Such acceptance was no injury or detriment to any one: not to the debtors, because they owed him twice the amount accepted; not to the other creditors, because their shares were not lessened thereby. Nor would the other creditors have been benefited by the plaintiff's refusal to accept the dividend, because their shares would not have been increased thereby, but the money would have been returned to the debtors at the end of the year. This is one of the peculiar provisions of the composition acts, which distinguishes them from ordinary insolvent laws.

In Embry *v.* Palmer, 107 U. S. 3, the creditor's judgment debt was saved from the operation of a State decree by the "full faith and credit" clause of the Constitution of the United States, and it was held that, by accepting the part which the decree said should constitute full satisfaction, he had not waived the benefit of this constitutional immunity; and that he could recover the unpaid balance of his debt. The facts were briefly these:—Embry's intestate recovered a judgment against Palmer and Stanton in the Supreme Court of the District of Columbia for about $9000, and Embry brought an action at law on that judgment in a State court of Connecticut. Palmer and Stanton then brought a bill in equity in a Connecticut court to enjoin the prosecution of the action at law, on the ground that the Federal judgment had been fraudulently obtained,

and that only $2296 was justly due; and that court perpetually enjoined Embry from prosecuting his action at law upon the payment to him of $2296, on the ground assigned. (Stanton *v.* Embry, 46 Conn. 65 and 595.) Embry accepted the sum of $2296 thus decreed to him as full satisfaction of his $9000 judgment, and then sued out this writ of error from the Supreme Court of the United States, on the ground that the Connecticut court had failed to give full faith and credit to the Federal judgment. In this court, it was argued that, by accepting the sum decreed by the court below, the plaintiff in error had waived his right to this writ of error, and was estopped to show that the decree below contravened the constitution. But the court held that there was no waiver or estoppel, and that Embry was entitled to recover the unpaid balance of his demand. In delivering the unanimous opinion of the court, Mr. Justice Matthews says: —

"The amount awarded, paid, and accepted constitutes no part of what is in controversy. Its acceptance by the plaintiff in error cannot be construed into an admission that the decree he seeks to reverse is not erroneous; nor does it take from the defendants in error anything, on the reversal of the decree, to which they would otherwise be entitled; for they cannot deny that this sum at least is due and payable from them to him." (Page 8.)

In Reynes *v.* Dumont, 130 U. S. 354, 394, Embry *v.* Palmer was cited by Mr. Chief Justice Fuller in delivering the opinion of the court, in support of the proposition that "the acceptance by appellants of what was confessedly theirs cannot be construed into an admission that the decree they seek to reverse was not erroneous, nor does it take from appellees anything, on the reversal of the decree, to which they would otherwise be entitled."

In Kimberly *v.* Ely, 6 Pick. 440, the creditor's claim was saved from the operation of the New York insolvent law by the clause prohibiting the States from impairing the obligation of contracts, and it was held that by proving his pre-existing claim, accepting a dividend and acting as assignee in insolvency, the creditor had not estopped himself to take advantage of the unconstitutionality of the insolvent law, and that he could recover the unpaid balance of his demand.

In that case, it appeared that both the parties were inhabitants of New York; that the contract (a promissory note) was made there prior to April 3, 1811; that the defendant obtained a discharge under the insolvent act of New York, of April 3, 1811; that the plaintiff proved his claim in insolvency, acted as one of the assignees, and received his dividend. After full and able arguments, the court held unanimously that the insolvent act of April 3, 1811, was unconstitutional and void, because it impaired the obligation of the plaintiff's contract; that the discharge was a nullity as against the plaintiff; that the facts that the plaintiff had proved his claim, and acted as assignee, and accepted his dividend, did not bar him from recovering a judgment for the balance of his claim after deducting the dividend, and that "nothing short of a discharge given by the plaintiffs could annihilate their claim," or prevent them from maintaining this action. (Page 453.)

Mr. Chief Justice Parker, for the court, says: — "It has been argued that the proceedings are not void but voidable, and therefore may become valid by the consent or ratification of the party whose interests are affected. But an act of the legislature which it has no constitutional right or power to pass is a nullity, and all proceedings under it are void. The acts of individual citizens can give no force or effect to them. Besides, in the case presented by the plea, the proceedings of the plaintiffs ought to be considered as compulsory

rather than voluntary, and therefore cannot amount to a ratification, if a void act *could* be ratified. The act was clothed with all the usual legislative sanctions. Citizens would not be prompt to suspect that the sovereign guardian authority of their country had abused or violated their trust. They see the property of their debtor sequestrated, and are threatened with the loss of the whole unless they take measures to preserve a part. They are under a moral duress, and ought not to be held to have aided in raising the storm, merely because they try to save something from the wreck." (Page 452.)

Kimberly *v.* Ely was cited with approval by Royce, C. J., in

Blackman *v.* Green, 24 Vt. 17,21;

and by Shaw, C. J., in

Agnew *v.* Platt, 15 Pick. 417, 422.

In Woodbridge *v.* Wright, 3 Conn. 523, it was decided that a non-resident creditor who accepts a dividend without proving his claim is not bound by the discharge in another State, and is entitled to an execution against his debtor's body as well as against his estate.

In Montague *v.* Massey, 76 Va. 307, it was decided that a judge who accepts, in accordance with an unconstutional statute, a part of his lawful salary for the whole, is not estopped to insist upon the invalidity of the statute, and can recover the unpaid balance of his salary.

In Douglass *v.* Craig, 13 So. Car. 371, it was held that a judgment creditor whose demand is saved from the operation of a State homestead exemption act by the contract clause of the Federal constitution is not estopped to assert the unconstitutionality of the State law by accepting his share of the non-homestead prop-

erty of his deceased insolvent debtor, and may levy on the homestead to satisfy the unpaid balance.

It is settled that a foreign insurance company which accepts the benefit of a State statute allowing it to transact business within the State, and which expressly agrees in writing, in accordance with the statute, to abstain from removing suits brought against it in the State courts to the Federal courts, is not estopped to assert the unconstitutionality of the statute; nor does it waive any of its rights thereby, and it can remove the cause to a proper Federal court, notwithstanding the benefit received.

Insurance Co. *v.* Morse, 20 Wall. 445 (reversing Morse *v.* Home Ins. Co., 30 Wis. 496);
Barron *v.* Burnside, 121 U. S. 186;
Railway Assurance Co. *v.* Pierce, 27 Ohio St., 155 (overruling New York Life Ins. Co. *v.* Best, 23 Ohio St. 105).

The preceding cases present illustrations of the receipt of a substantial benefit conferred by an unconstitutional State statute; for without the State's consent, express or implied, a foreign insurance company is not entitled to transact business in the State.

Paul *v.* Virginia, 8 Wall. 168;
Doyle *v.* Continental Ins. Co., 94 U. S. 535.

In the case at bar the composition acts did not confer any substantial benefit upon the creditor, to which he would not have been entitled without those acts; for the receipt of part of an ascertained and liquidated debt is no legal benefit to the creditor or detriment to the debtor, and is therefore not such a consideration as will support a parol agreement to accept the part in satisfaction of the whole.

Cumber *v.* Wane, 1 Strange, 426;
Pinnel's Case, 5 Coke, 117;
Smith *v.* Bartholomew, 1 Met. 276;
Harriman *v.* Harriman, 12 Gray, 341;
Latrop *v.* Page, 129 Mass. 19;
Weber *v.* Couch, 134 Mass. 26.

Nor can such an agreement be supported as an accord and satisfaction; nor upon the principles of waiver and estoppel.

Tyler *v.* Odd Fellows' Relief Association, 145 Mass. 134, 138;
Martin *v.* Frantz, 127 Pa. St. 389.

In Railroad Co. *v.* Maryland, 21 Wall. 456, it was held that a railroad company is not estopped to assert the unconstitutionality of a State statute, requiring it to pay to the State one-fifth of the amount of passenger fares, by having accepted the charter, constructed the road and received the benefit of the statute. The decision of the State court in State *v.* Baltimore & Ohio Railroad Co., 34 Md. 344, was reversed upon this point, but the judgment was affirmed on the ground that the statute was constitutional.

It is well settled that a creditor who accepts the amount of a judgment or decree for less than he claims to be due is not thereby estopped to show that the judgment or decree is erroneous or void; nor does he thereby waive any of his former rights.

Erwin *v.* Lowry, 7 Howard, 172, 183–184;
Planters Bank *v.* Union Bank, 16 Wall. 483, 497;
Reynes *v.* Dumont, 130 U. S. 354;
Bowers *v.* Hammond, 139 Mass. 360;
Catlin *v.* Wheeler, 49 Wis. 507;
Morriss *v.* Garland, 78 Va. 215, 234;
C. & E. I. Ry. Co. *v.* Kamman, 119 Ill. 362.

CASES ON WAIVER DISTINGUISHED.

Clay *v.* Smith, 3 Peters, 411, was an action brought in the United States district court of Louisiana on a debt contracted in 1808. Smith, the creditor, was a citizen of Kentucky, and Clay, the debtor, a citizen of Louisiana. The sole defence was a discharge under the insolvent laws of Louisiana, which the defendant obtained in 1811. Mr. Justice Johnson speaking for the court states the other facts and the reason for the judgment as follows: —"The plea sets out his petition to the court; his surrender of his effects; the schedule of his debts, in which Smith's debt is specified, as also the payment to him of ten per cent, the dividend declared by the assignees of the bankrupt; and the judgment of the court, rendered in pursuance of the consent of more than a majority of his creditors in number and amount, that he be discharged, 'as well his person as his future effects, from all the claims of his creditors.' The language of the plea is, 'upon which said petition, the usual proceedings being had thereon, the said plaintiff and other creditors and said defendant being parties thereto, the said supreme court by their final decree pronounced in the premises, on the 15th of June, 1811, declared the said defendant, as well his person as his subsequently acquired property and effects, forever released from all claims, debts and demands,' etc., previously due.

"This plea is demurred to, and thus the question is raised whether Smith, by voluntarily making himself party to such proceedings, has not abandoned his extra-territorial immunity from the operation of the bankrupt laws of Louisiana. We are of opinion that he did; and was bound by the decision of the State court to the same extent to which citizens of that State were bound." (Pp. 411–412.)

The point decided may be shortly stated thus: — A non-resident creditor who voluntarily makes himself a party to proceedings in an insolvency court of the debtor's State, thereby abandons his extra-territorial immunity from the operation of the insolvent laws of that State, and confers jurisdiction upon the insolvency court, and becomes bound by its decree of discharge to the same extent as resident creditors.

In Clay *v.* Smith the original defect was one of jurisdiction, — neither the legislature nor the insolvency court of Louisiana had jurisdiction over a citizen of Kentucky while he remained at home, —

D'Arcy *v.* Ketchum, 11 How. 165, 176;

but when he voluntarily appeared in the insolvency court of Louisiana, he cured this defect of jurisdiction and became bound by the decree of discharge. Such appearance conferred jurisdiction, and the discharge bound him, and would have bound him if he had not accepted a dividend.

Baldwin *v.* Hale, 1 Wall. 223;
Gilman *v.* Lockwood, 4 Wall. 409;
Denny *v.* Bennett, 128 U. S. 489;
Brown *v.* Smart, 145 U. S. 454, 457;
Sloane *v.* Chiniquy, 22 Fed. Rep. 213, 215 (Miller, J.);
Phœnix National Bank *v.* Batcheller, 151 Mass. 589;
Main *v.* Messner, 17 Oregon, 78;
Bedell *v.* Scruton, 54 Vt. 493, 494;
Roberts *v.* Atherton, 60 Vt. 563;
Pullen *v.* Hillman, 84 Me. 129;
Blackman *v.* Green, 24 Vt. 17, 21;
Phelps *v.* Borland, 103 N. Y. 406.

In Gilman *v.* Lockwood (supra), this court says by Mr. Justice Clifford : —

"Insolvent laws of one State cannot discharge the contracts of citizens of other States, because such laws have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceedings, has no jurisdiction of the case." (4 Wall. 411.)

In Denny *v.* Bennett, 128 U. S. 489, the same view was re-affirmed, and in the opinion of the court delivered by Mr. Justice Miller, it is said : —

"In other words, whatever the court before whom such proceedings are had may do with regard to the disposition of the property of the debtor, it has no power to release him from the obligation of a contract which he owes to a resident of another State, who is not personally subjected to the jurisdiction of the court." (Page 498.)

In Phœnix National Bank *v.* Batcheller, 151 Mass. 589 at 591, the court says by Holmes, J. : —

"The often repeated view of the Supreme Court of the United States is, that discharges like the present are void for want of jurisdiction, and that statutes purporting to authorize them are beyond the power of the States to pass." It was accordingly held that a discharge under the anterior insolvent law of Massachusetts was no defence to an action by a National Bank located in Rhode Island which had not proved its claim in insolvency.

In Roberts *v.* Atherton, 60 Vt. 563 at 564, the court says per Ross, J. : —

"State insolvent laws can have no jurisdiction beyond the limits of the State in and for which they were enacted, and if the debt is of such a character that it

follows the person of the creditor, no matter where made, or where to be paid, to give a State insolvent court jurisdiction of the debt, it must have jurisdiction of the owner of the debt."

In Clay *v.* Smith it was merely a question of conferring jurisdiction by appearance. In the case at bar no such question arises. The plaintiffs were residents of Massachusetts, and its courts had jurisdiction, whether they appeared or not. They appeared in the insolvency court and objected, not that the court had no jurisdiction, but that the composition acts were unconstitutional. That was the proper way to make their objection known, and to insist upon their rights. The court below concedes that they did not waive any rights by that conduct. (Record, p. 17.)

In Bigelow *v.* Pritchard, 21 Pick. 169, the only point decided was that the provision in the Massachusetts insolvent law of 1838, which dissolved an attachment of the debtor's property made after the law went into effect, did not impair the obligation of pre-existing contracts. It was an action of trover by insolvent assignees to recover several articles of personal property which the defendant, as deputy sheriff, had attached on a writ against the insolvent debtor; and it was held that the plaintiffs could recover, because the act merely affected the remedy, and not the right of the attaching creditor. It is true that Judge Putnam says that if the pre-existing creditor "proved his claim then he would be considered as having assented to the act" (page 172), and that "the application of the law is confined to contracts made after it went into operation, unless the creditors whose claims accrued under the old law should come in and prove their claims under the new." (Page 174.) But these are mere *dicta*, and they afford no support to the proposition that the acceptance of a dividend operates as a waiver of the constitutional right of immunity from the

operation of a State statute. Nor do the other cases cited by the court below support that proposition.

Van Hook *v.* Whitlock, 7 Paige, 373, and 26 Wend. 43, was a bill in equity to enforce the personal liability of the defendants as stockholders in an insurance company organized under the laws of New York. On April 15, 1814, the legislature passed an act providing for the winding up of insolvent insurance companies, and this company made an assignment under this law. One section of this act repealed the personal liability of stockholders. The plaintiff proved his claim in insolvency and accepted a dividend of fifty-one per cent from the assets of the company, without protest or objection. He then brought this suit, claiming that, as he was a creditor by contract made before the passage of the act of April 15, 1814, that act impaired the obligation of his contract by releasing the personal liability of stockholders for debts of the company. It was held that the plaintiff was estopped to enforce such personal liability against the stockholders by having proved his claim and accepted a dividend under the assignment.

It is respectfully submitted that this decision is wrong in principle, and contrary to Embry *v.* Palmer, 107 U. S. 3, and to Kimberly *v.* Ely, 6 Pick. 440, in so far as it holds that a creditor waives a constitutional right by accepting part of his demand. But even if it be rightly decided, it is distinguishable from the case at bar. The insolvent law of New York required the insurance company to surrender all its assets, and each creditor was entitled to his *pro rata* share of the assets. A creditor who accepted his share, therefore lessened the shares of other creditors, and thereby committed an act to their detriment or injury. To allow him to recover the balance would be virtually a fraud upon the other creditors. Hence it may be, that, in the interests of the other creditors, an estoppel should be raised

against the creditor who accepts a dividend under such circumstances.

Smith *v.* Bartholomew, 1 Met. 276, 278;
Perkins *v.* Lockwood, 100 Mass. 249, 250;
Boyd *v.* Hind, 1 H. & N. 938, 948;
Steinman *v.* Magnus, 11 East, 390;
Warren *v.* Skinner, 20 Conn. 559, 562.

But in the case at bar, the other creditors suffered no loss or detriment by the plaintiff's acceptance of a dividend. They would not have received a cent more if he had refused to accept it. The only result of his refusal would have been that the amount of his dividend would have been returned to the debtors at the end of the year, according to the express provision of section 5 of the composition act of 1885. The creditor did not assent to the composition, but objected and protested in all proper ways. The debtors did not make a full surrender and distribution of their property, but only of sufficient to pay fifty per cent of their indebtedness. To create an estoppel against the creditor and in favor of the debtors so situated, seems to be contrary to well-settled principles. Not a single element of waiver or estoppel is perceived.

Moreover, the stockholders were not primarily but only secondarily liable for the debt in suit.

A person who voluntarily avails himself of a new right or a new benefit conferred by an unconstitutional statute to the detriment of another person is estopped to assert its unconstitutionality in a subsequent action between them.

Daniels *v.* Tearney, 102 U. S. 415;
Furguson *v.* Landram, 5 Bush (Ky.), 230;
People *v.* Bunker, 70 Cal. 212.

In Eustis *v.* Bolles, the plaintiffs did not avail themselves, to the detriment of the defendants, of any new

right or benefit conferred by the composition acts. On the contrary, the defendants availed themselves of the composition acts to the detriment of the plaintiffs, by compelling them to take one-half their claim or nothing.

III.

CONSTITUTIONALITY.

The composition acts so affected the plaintiffs' remedy as it subsisted in the State when and where the contract was made and where it was to be performed as substantially to impair and lessen the value of the contract; and, therefore, they impair the obligation of the contract in suit and are void.

Edwards *v.* Kearzey, 96 U. S. 595;
Seibert *v.* Lewis, 122 U. S. 284;
Bronson *v.* Kinzie, 1 Howard, 311, 317;
Curran *v.* Arkansas, 15 Howard, 304, 309–310;
Hawthorne *v.* Calef, 2 Wallace, 10;
Von Hoffman *v.* Quincy, 4 Wallace, 535, 553;
Walker *v.* Whitehead, 16 Wallace, 314;
Louisiana *v.* New Orleans, 102 U. S. 203, 206;
Hartman *v.* Greenhow, 102 U. S. 672;
Matter of Wendell, 19 Johns. (N.Y.), 153.

The single defence to this action is the defendants' discharge under and pursuant to the "composition acts" of Massachusetts, being Statute 1884, c. 236, and Statute 1885, c. 353.

The single reply of the plaintiffs is that the composition acts are unconstitutional and void, chiefly on the ground that they impair the obligation of the contract in suit.

Statute 1884, c. 236, reads as follows : —

AN ACT to provide for Composition with Creditors in Insolvency.

Be it enacted, etc., as follows :

SECTION 1. Instead of proceeding as required by existing laws relating to insolvency, an insolvent debtor may proceed for a discharge from his debts in the manner and on the terms and conditions herein prescribed.

SECT. 2. At any time after the filing of the petition by or against the debtor, and the schedules required by law, which schedules shall include the name and full post office address of every known creditor and a brief description of all the debts, the debtor may file a written proposal for composition with his creditors, setting forth the amount of the proposed dividend, which shall be payable only in money, the time or times when the same shall be payable, and the security to be given for such payments so far as deferred. No such proposal shall be considered unless it conforms to these requirements, nor unless it provides for payment in full of all debts and charges entitled by law to priority.

SECT. 3. If the allegations of the debtor's petition appear to be true, or if a warrant has been issued thereon, the court, upon filing of the proposal for composition, may stay or suspend any process or proceeding which would otherwise be required by law, and may make such orders relating thereto, or to the custody of the debtor's estate, as justice and the interests of the creditors may require ; and shall order a hearing on such proposal as early as may be, of which the register shall send notice by mail post paid to all known creditors not less than seven days before the day appointed therefor, stating the substance of the proposal.

SECT. 4. All books of account and papers of the debtor relating to his estate shall until the final hearing on confirmation of the composition be open at all

reasonable times to examination by any creditor or his agent, and the court may enforce production thereof; and during such period the debtor or any other person may be examined by the court or by any creditor in the manner and under the circumstances prescribed by section seventy of chapter one hundred fifty-seven of the Public Statutes.

SECT. 5. (This section is amended by Statute of 1885, c. 353, sec. 1, and is given below as amended.)

SECT. 6. The debtor shall be present at the hearing and may then be examined by the court or by any creditor touching his estate or his dealings therein, and all pertinent evidence may be offered. At any time before the hearing is closed the debtor may file any modification of his proposal more favorable to the creditors but not otherwise, and such modified proposal shall thereafter be considered the proposal.

SECT. 7. (This section is amended by Statute of 1885, c. 353, sec. 2, and is printed below in its amended form.)

SECT. 8. (This section is repealed by Statute of 1885, c. 353, sec. 3.)

SECT. 9. If the composition appears to have been duly assented to, and to be consistent with justice and for the interests of the creditors, the court shall order the same to be confirmed; and by the same order shall limit the time within which all moneys for cash payments and all vouchers and securities for deferred payments shall be deposited in court; and upon such deposit within the time so limited therefor, the court shall grant to the debtor a certificate of discharge from his debts, which shall be as nearly as may be in the same form and which shall have the same force and effect as though obtained by the other proceedings in insolvency prescribed by existing laws; *provided, however*, that the same shall not be annulled for any cause which was brought to the notice of the court on

the hearing for confirmation, or which was then known to the creditor applying to have the same annulled; and *provided further*, that the same shall not bar the debt of any creditor whose name was fraudulently and wilfully omitted from the debtor's schedule of creditors. But the debt of any creditor omitted therefrom only through mistake, or want of knowledge, shall be barred, and he shall be entitled to and may recover against the debtor the amount of the dividend to which he would have been entitled in the composition proceedings.

SECT. 10. Upon the granting of the discharge, the moneys, vouchers and securities deposited in court shall be paid and delivered by the register on demand to the persons entitled thereto, and all other property of the debtor shall revert to and be revested in him; and the court may order any necessary or proper release or reconveyance thereof by any assignee or trustee to whom the same may have been assigned or conveyed.

SECT. 11. If the money for the cash payments and the vouchers and securities for deferred payments are not deposited in court within the time limited by the order of confirmation, the case shall proceed in insolvency; and in such event the register shall deliver to the assignee all moneys and securities which are the property of the debtor which shall have been deposited in court; and all other securities and vouchers which shall have been so deposited shall be returned by the register to the persons who furnished or deposited the same or be otherwise disposed of as justice may require. In such case the stay or suspension of other proceedings by reason of the attempted composition shall not work any forfeiture or affect any rights, but the period of suspension shall be excluded in computing other periods of time prescribed by the laws relating to insolvency.

SECT. 12. The court, except as herein otherwise expressly provided, may allow all just and proper amendments and make all proper orders, in the course of the proceedings or thereafter, necessary to carry the same into full effect according to the terms and intent of this

act, and may enforce all such orders, summarily or otherwise as justice may require, by any appropriate process.

SECT. 13. If an insolvent debtor shall knowingly place upon his schedule of creditors any false or fictitious debt with intent to deceive or defraud his creditors, or in case of any person having to his knowledge proved or attempted to prove a false or fictitious debt against his estate, shall fail to disclose the same to the court forthwith upon notice or knowledge thereof, or shall make any payment or give or promise any advantage to any creditor with intent thereby to procure his assent to a composition, he shall be punished by imprisonment in the state prison not exceeding five years or in the jail not exceeding two years.

SECT. 14. If any creditor of an insolvent debtor shall knowingly prove any false or fictitious debt against his estate, or shall receive or procure or attempt to procure any payment or advantage in consideration of his assent to a composition, he shall be punished by imprisonment in the jail not exceeding two years or by fine not exceeding one thousand dollars.

SECT. 15. This act shall not apply to corporations.

SECT. 16. This act shall take effect upon its passage. [*Approved May* 13, 1884.]

Statute 1885, c. 353, reads as follows: —

AN ACT relating to Composition with Creditors in Insolvency.

Be it enacted, etc., as follows:

SECTION 1. Section five of chapter two hundred and thirty-six of the acts of the year eighteen hundred and eighty-four is amended to read as follows: — *Section* 5. The provisions of sections twenty-six to thirty-one inclusive, and of sections thirty-three to thirty-nine inclusive, of said chapter, concerning debts

and proof of claims, shall apply to and be of force in composition proceedings so far as they can be applied thereto. But the proceedings shall not be stayed or suspended on account of an appeal from the allowance or rejection of a claim.

SECT. 2. Section seven of said chapter two hundred and thirty-six is amended to read as follows:— *Section 7.* The hearing shall then be adjourned not less than seven days and notice thereof sent to all creditors as before provided, and if, at or before the day to which such or any subsequent adjournment is made, the debtor shall file in court the written assent to the proposal of a majority in number and value of his creditors who have proved their claims, if the same be for the payment of not less than fifty per centum to the general creditors, or if less than fifty per centum, of three-fourths in number and value of such creditors, the court shall proceed at the hearing, or at a further adjournment thereof, to determine whether the composition shall be confirmed, and any creditor may be heard thereon. Any matter which would prevent or avoid a discharge in insolvency by existing laws may be considered in ascertaining the expediency of confirming the same, but not as an absolute bar thereto. If the only objection thereto relates to the security for deferred payments, other or further security may then be offered. No claim entitled to priority shall be counted, nor shall any creditor whose claim is less than fifty dollars in amount be counted in number of creditors.

SECT. 3. Section eight of said chapter two hundred and thirty-six is hereby repealed.

SECT. 4. The register shall be allowed the same compensation for giving notices to creditors as is allowed to messengers by section one hundred and thirty-seven of chapter one hundred and fifty-seven of the Public Statutes, and for the custody and payment of the moneys, vouchers, securities and dividends, such sum as the court may deem just and reasonable but not exceeding one per centum thereof.

SECT. 5. After the expiration of one year from the deposit in court of the moneys, vouchers and securities, as provided for by section nine of said chapter two hundred and thirty-six, the court may, after notice, by mail post paid, to creditors who have not taken up their dividends, order all such moneys, vouchers and securities, then remaining on deposit in court, to be paid and transferred to the person who deposited the same.

SECT. 6. No debt or claim against a pledgee created by his sale of collateral securities in a manner not authorized by his contract with the pledger, or by the provisions of sections ten and eleven of chapter one hundred and ninety-two of the Public Statutes, shall be discharged under proceedings in insolvency, but the provisions of section eighty-four of chapter one hundred and fifty-seven of the Public Statutes shall apply thereto.

SECT. 7. This act shall take effect upon its passage. [*Approved June* 18, 1885.

The court below seems to concede that the composition acts are unconstitutional, as applied to prior contracts. Its language is: — "We assume in favor of the plaintiff, that the composition statutes above cited, as they undertake to discharge debts due to creditors upon conditions materially different from those existing prior to the time of their passage, are as to such prior creditors unconstitutional, as impairing the obligation of their contracts; but they are not wholly unconstitutional and void. They are clearly valid as to all debts between citizens of the State which accrue after the statutes went into effect; and a prior creditor, if he elects to avail himself of the composition proceedings and to accept their benefits, may waive his right to object that they are invalid as to his debts." (Record, p. 17.) The court then proceeds to state its reasons for holding that the plaintiff had waived his constitutional rights.

The contract was made in Massachusetts in 1880, four years prior to the passage of the first composition act. (Record, p. 19.) At that time and place, in order to obtain a discharge "an insolvent debtor was obliged to surrender *all* his property which was not exempt from attachment to his assignee for distribution among his creditors." (Opinion of the court below, Record, p. 16.)

General Statutes of Massachusetts, c. 118, §44;
Acts of 1879, c. 245, §3;
Barton *v.* White, 144 Mass. 281, 283;
Gray *v.* Bennett, 3 Met. 522, 524-525;
Stearns *v.* Harris, 8 Allen, 597, 598.

Section 44 of chapter 118 of the General Statutes reads as follows: —

"SECT. 44. The assignment shall vest in the assignee all the property of the debtor real and personal which he could have lawfully sold, assigned or conveyed, or which might have been taken on execution upon a judgment against him, at the time of the first publication of the notice of issuing the warrant, although the same is then attached on mesne process as the property of the debtor; and shall be effectual to pass all said estate, and, subject to the provisions of the following section, to dissolve any such attachment. The assignment shall vest in the assignee all debts due to the debtor or any person for his use, and all liens and securities therefor, and all his rights of action for goods or estate real or personal, and all his rights of redeeming such goods or estate. The assignee may redeem all mortgages, conditional contracts, pledges and liens, of or upon any goods or estate of the debtor, or sell the same subject to such mortgage or other incumbrance."

This section was amended by section 3 of chapter 245 of the Acts of 1879, which reads as follows: —

"SECT. 3. Section forty-four of the same chapter is hereby amended by inserting after the word 'warrant' in the fifth line, the following: 'in case of voluntary proceedings, and at the time of the first publication of notice of the filing of the petition in cases of involuntary proceedings.'"

In 1880 each creditor was entitled to receive his proportionate share of all the debtor's property not exempt from attachment, and he could not be deprived of any part of such share by the assent of other creditors, however large a majority they might be.

General Statutes of Massachusetts, c. 118, §95;
Purple *v.* Cooke. 4 Gray, 120, 121.

Section 95 of chapter 118 of the General Statutes reads as follows: —

"SECT. 95. At the third meeting the assignee shall exhibit to the judge and creditors present, fair and just accounts of all his receipts and payments touching the estate, and shall, if required by the judge, be examined on oath as to the truth of such accounts. The judge shall thereupon order a dividend of the estate and effects, or of such part thereof as he deems fit, among such of the creditors as have proved their claims, in proportion to their respective debts."

In Purple *v.* Cooke, 4 Gray, 120, 121, Merrick, J., in delivering the court's opinion, says: —"One of the chief purposes of the whole series of the statutes for the relief of insolvent debtors is the equal distribution of their property among their creditors in proportion to the amount of their respective debts."

Under the composition acts "the debtor retains all his property except what is paid into court" (Opinion, Record, p. 17), and the amount which is paid into court and which is distributed among his creditors depends

upon the assent of a certain majority of his creditors. If a majority in number and value of his creditors who have proved their claims assent, he may obtain a discharge from all his debts by the payment into court of only one-half of his debts. If three-fourths in number and value of such creditors assent, he is entitled to a discharge from all his debts upon the payment into court of less than one-half of the amount of his debts. (Opinion, Record, p. 16.)

Statute 1885, c. 353, §2 (printed above).

In this case, the defendants obtained their discharge without a surrender of all property not exempt from attachment, and by the payment into court of fifty per cent of their debts, in accordance with the assent of a mere majority of their creditors, and against the vigorous dissent of the plaintiff and two other creditors whose demands aggregated $44,699.29. (Record, p. 22.)

Under the insolvent law in force in 1880 if a debtor's assets amounted to 80 cents on the dollar of his liabilities, his creditors received 80 cents on the dollar of their claims, and they could not be forced to accept any less sum by the assent of any number of the other creditors. But under the composition acts, though the debtor's assets amount to 80 or 90, or even 100 cents on the dollar of his liabilities, the creditors receive only 50 cents on the dollar of their claims, if the debtor can procure, by hook or by crook, the assent of a majority in number and value of his creditors, who have proved their claims, to accept that amount. Such statutes open wide the door of fraud and collusion. To illustrate: suppose that the debtor's assets amount to $80,000 and his liabilities to $100,000, due to 100 creditors, $1000 to each creditor. If 51 creditors prove their claims, a majority consisting

of 26 creditors, with claims amounting to $26,000, can, by assenting to an offer of 50 cents on the dollar, compel the other 74 creditors to accept 50 cents on the dollar. The debtor would obtain his discharge by the payment of $50,000, and would retain $30,000 as the fruit of the transaction. Or the debtor, under secret agreements with the 26 assenting creditors, could pay them 100 cents on the dollar to assent to his offer of fifty per cent, and have $17,000 left after paying the other 74 creditors 50 cents on the dollar. ($80,000 — $26,000 — $37,000 = $17,000.)

To summarize the foregoing : —

The insolvent laws in force when and where the contract was made and where it was to be performed authorized a discharge only when the debtor made a surrender of all his property not exempt from attachment to the assignee for *pro rata* distribution among the creditors ; and no creditor could be deprived of his *pro rata* share by the assent of other creditors to accept less than such share. The composition acts authorize a discharge without such surrender and distribution of the debtor's property ; and, if a majority in number and value of the creditors who have proved their claims assent to the debtor's offer of fifty per cent, all the other creditors are compelled to accept the same dividend, and are deprived of the right to receive their *pro rata* shares of all the debtor's property not exempt from attachment.

It is well settled that State exemption laws passed after the contract's making which increase the value of property exempt from attachment and execution, impair the obligation of pre-existing contracts and are void.

Edwards *v.* Kearzey, 96 U. S. 595 ;
Gunn *v.* Barry, 15 Wallace, 610 ;
Cochran *v.* Darcy, 5 So. Car. 125.

In the leading case of Edwards *v.* Kearzey, 96 U. S. 595, it appeared that at the time the plaintiff's contract was made the exemption laws of North Carolina allowed property not exceeding $550 in value to be exempt from attachment and execution. Afterwards, in 1868, a new constitution was adopted, by which the exemptions were increased to not exceeding $1500 in value. It was held that this provision of the State constitution was void, because it so affected the plaintiff's remedy, as it subsisted when and where his contract was made and was to be performed, as substantially to impair and lessen the value of his contract. The ground of the decision was stated by Mr. Justice Swayne in these words: —

"The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy, as substantially to impair and lessen the value of the contract, is forbidden by the constitution, and is, therefore, void." (Page 607.)

The composition acts are somewhat of the nature of exemption laws, in that they exempt a certain part of a debtor's property from the claims of creditors; but they are more open to the objection of impairing the obligation of contracts, because they authorize a discharge of the debt without payment in full, while exemption laws do not authorize such a discharge of the debt. Under the insolvent law of Massachusetts as it stood in 1880, only such property as was exempt from attachment was free from creditor's claims; but under the composition acts, all his property in excess of the percentage agreed to by a certain majority of his creditors, is exempt from creditor's claims, and becomes the property of the debtor.

In the State courts there are some cases directly in

point respecting a change in insolvent laws, which support the proposition that,—

A subsequent statute, giving greater facilities to the debtor in obtaining his discharge in an insolvency court than were given him by the law in force when and where the contract was made; or which authorizes a discharge from a pre-existing contract, in a case where such a discharge could not previously have been granted,—impairs the obligation of the contract, and is unconstitutional and void; and a discharge obtained under such a statute is no defence to, an action on the claim.

Matter of Wendell, 19 Johns. 153;
Salters *v.* Tobias, 3 Paige (N. Y.), 338, 344;
Wyman *v.* Mitchell, 1 Cow. 316;
Bryar *v.* Willcocks, 3 Cow. 159;
Hundley *v.* Chaney, 65 Cal. 363.

In the Matter of Wendell, 19 Johnson, 153, it appeared that the contract was made in New York, in 1812, at which time the insolvent act of 1801 was in force, by which *three-fourths* of the creditors were required to join in the petition for the debtor's discharge. The discharge pleaded in defence was obtained under the act of 1813, by which only *two-thirds* of the creditors were required to join in the petition for the debtor's discharge. It was held that the difference between the two acts (though parts of the same system in regard to insolvent debtors) was so material that the insolvent could not be considered as discharged under the act of 1813, passed subsequent to the time of making the contract, and being therefore, in this respect, unconstitutional, the discharge under it was void.

Mr. Chief Justice Spencer, in delivering the unanimous opinion of the court, said:—

"The act of 1813 gave greater facility to the discharge of the insolvent than the act of 1801, by permitting creditors to a less amount of debts to become petitioners. The difference may be very material in many cases, and we cannot say that, even in this case, the debtor would have been discharged but for the superior facility afforded him by the act of 1813." (Page 154.)

This case was decided in 1821, and it was cited with approval, and followed in the four cases cited with it above, the last of which was decided in 1884, and also in Conway *v.* Seamons, 55 Vt. 8.

In Salters *v.* Tobias, 3 Paige (N.Y.), 338, Chancellor Walworth said:—"The case of Sturges *v.* Crowninshield (4 Wheat. Rep. 122) . . . settles conclusively that the Legislature could not pass any law giving greater facilities to the debtor in obtaining his discharge, which would impair the obligation of any contract then existing, or authorize a discharge from such contract in a case where such a discharge could not previously have been granted." (Page 344, citing Matter of Wendell, 19 Johns. Rep. 153.) It was accordingly held that, as the insolvent act of 1813 required two-thirds of all the domestic creditors to join in the petition, "the tenth section of the act of February, 1817, if it required a different construction, introduced a change in the law which could not affect the rights of creditors as to debts previously contracted." (Page 346.)

IV.

The judgment should be reversed, with instructions to enter judgment for the plaintiffs.

U. S. Rev. Stat. §709;
Farmers & Mechanics' Bank *v.* Smith, 6 Wheat. 131.

WM. A. MACLEOD,
CONRAD RENO,
Counsel for Plaintiffs in Error.

NOV 7 1893
JAMES. H. McKENNEY.
CLERK.

CASE No. 13,969.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No. 74.

ISABEL B. EUSTIS AND FLORENCE D. EUSTIS,
EXECUTRIXES OF THE WILL OF WILLIAM T. EUSTIS,
PLAINTIFFS IN ERROR,

vs.

CHARLES H. BOLLES AND GEORGE F. WILDE.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR DEFENDANTS.

JAMES B. RICHARDSON,
EDWIN B. HALE,
Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1892.

ISABEL B. EUSTIS ET AL., *Executrices of will of* WILLIAM T. EUSTIS,
Plaintiffs in Error,
v.
CHARLES H. BOLLES *and* GEORGE F. WILDE, *Defendants.*

BRIEF FOR DEFENDANTS.

JAMES B. RICHARDSON, EDWIN B. HALE, *Counsel.*

Does the case present a federal question? The Court will look into the opinion, as well as other parts of the record to see what the question, decided by the Supreme Judicial Court of Massachusetts, was.

Eustis *v.* Bolles, 146 Mass. Reports 413.
McManus *v.* O'Sullivan, 91 U. S. 578.
Brown *v.* Atwell, 92 U. S. 327.
Chapman *v.* Goodnow, 123 U. S. 527.
New Orleans (Water-works) Co. *v.* La. Sugar Refining Co., 125 U. S. 18.
Kreiger *v.* Shelby Railroad Co., 125 U. S. 39.

It will not be contended that the certificate of the Chief Justice of the State Court in allowing the writ is conclusive that a federal question has been decided.

Roby *v.* Colehour, 146 U. S. 153–159.
Adams Co. *v.* Burlington and Missouri Railroad Co., 112 U. S. 123.

It appears from the opinion, page 15 of the record and from the statement of facts page 20 and 21, that William T. Eustis proved his claim in the Court of Insolvency, participated in the proceedings, and took the offer of composition, fifty per cent of the claim, which offer as the Court says "was not in part payment of his debt, but in full discharge of it" (see Record, page 17); and — upon the Court confirming the composition, received the money, $8,020, which had been deposited with the register, gave a receipt reciting that i

was "according to the composition confirmed by the Court in the case". See Record, page 21.

The opinion and judgment of the Supreme Judicial Court upon these facts is, that it would be "clearly a violation of the whole purpose and spirit of the composition for any creditor of the insolvent to draw out his share of the money, and apply it in part payment of his debt holding the insolvent liable for the balance. It is unjust to the person who deposited the money. As the plaintiff saw fit to accept the offer, he thus made himself a party to the composition, and such acceptance was inconsistent with the right to enforce the balance of his debt in violation of the terms of the composition. We are of opinion that *he has waived his right* to object that the discharge is invalid as to him." Further in the opinion the Court says, "The accepted doctrine now is that such creditors (foreign creditors) waive their right to object that as to their debt the law is unconstitutional, and the same rule applies *a fortiori* to a citizen of this State who elects to prove his debt contracted before the law took effect and receives all the benefits of the law."

So far from deciding that the "Composition Acts" were constitutional, that Court, assumed for the purposes of the argument, that said acts might not, as to some creditors, be binding upon them (see page 17 of record); but found that this creditor, Eustis, had waived any right which he ever had, to raise that question. He had elected to come in and take the sum which the defendants had offered "*in full discharge of*" the claim. It is not unlike in principle to Beaupré *v.* Noyes, 138 U. S. 397 where the plaintiff in error claimed that he had been "denied a right arising under an authority exercised under the United States," to contest the validity of an alleged fraudulent assignment under the territorial laws of Montana, but it appeared that the State Court had found that the plaintiff in error had recognized the assignee in his official capacity and dealt with him as such. This Court there said, "the State Court evidently intended to hold that, even if the assignment was originally fraudulent, as against the creditors, by reason of Young (the original debtor), remaining in the store as clerk for Winchester (the assignee), and assisting the latter in carrying on the business, it was competent for the plaintiffs in error to waive the fraud and treat the assignment as valid for all the purposes specified in it. That view does not involve a federal question." Clearly the decision in the case at bar was not the decision of a federal question.

See also

Texas & Pacific Railway Co. *v.* Southern Pacific Co., 137 U. S. 48.

"The rule is settled that to give this court jurisdiction of a writ of error to a State Court it must appear affirmatively, not only that

a federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

Cook County *v.* Calumet & Chicago Canal and Dock Co., 138 U. S. 635, 651.
Blount *v.* Walker, 134 U. S. 607.

It has been repeatedly held also that if a federal question has been raised and decided by a State Court adversely to a party, if also, another question not federal has also been raised and decided against him in the case, and the decision of the latter question is sufficient to sustain the judgment, this court will not review the judgment.

Jenkins *v.* Loewenthal, 110 U. S. 222.
Hale *v.* Akers, 132 U. S. 554.

In the case at bar no federal question was raised or decided by the State Court adversely to the plaintiffs in error; on the contrary the only question decided against them was that the plaintiffs' testator had, by his acts, waived his right to object that the "Composition Acts," were void as to his debt. The plaintiffs in error admit, in effect, in the second and third of their assignments of errors (see page 13 of record) that this question of waiver was the one decided by the State Court. But this is not a federal question.

In the first of said assignments of errors it is claimed that the State Court erred in not holding that said "Composition Acts" are in contravention of the constitution of the United States. But the case did not require the court to so hold. It put the decision solely upon the ground of waiver as before stated; and the decision of that question was sufficient to sustain the judgment.

Jenkins *v.* Loewenthal, 110 U. S. 222.
Hale *v.* Akers, 132 U. S. 554.

The State Court did not hold or decide as assumed, in the fourth and fifth assignments of errors (see page 14 of record), that said "Composition Acts" are not in contravention of the provisions of the Constitution of the United States. On the contrary that court assumed in favor of the plaintiffs in error that said acts were not binding upon them, and other creditors, whose claims existed prior to the passage of said acts, unless they had waived their right to object that they were invalid as to their debts. (See page 17 of the ecord.)

They claim by their sixth assignment of errors that the judgment of the State Court "reverses the established rule of construction applied to State Insolvent Laws of Massachusetts at the time when

the testator of the plaintiffs accepted his dividend." It does nothing of the kind. It is in perfect harmony with all the later decisions of the highest court of that State both before and since.

Bigelow *v.* Pritchard, 21 Pick. 169, 174.
Fisher *v.* Currier, 7 Met. 424.
Gilbert *v.* Hebard, 8 Met. 129.
Clark *v.* Hatch, 7 Cush. 455.
Marsh *v.* Putnam, 3 Gray, 551, 565.
Murray *v.* Roberts, 150 Mass. 353.

But if it did reverse any such rule of construction this would not be in contravention of any provision of the Constitution of the United States especially in a case like this between citizens of Massachusetts. The seventh assignment of errors is too general and vague to require consideration.

If the question decided by the Supreme Judicial Court of Massachusetts was one of waiver only, and, therefore, not a federal question, this court will not revise that decision, nor consider whether it decided it correctly.

Beaupré *v.* Noyes, 138 U. S. 397.

II.

But if this court shall consider whether the State Court correctly decided the question of waiver by the plaintiffs' testator it will be found that that decision is fully sustained by all the authorities.

The plaintiffs' testator appeared with his claim in a duly constituted court, having jurisdiction of the cause of the defendants, took part in the composition proceedings, proved his claim therein, submitted to the jurisdiction, accepted and took the sum of $8,020, which, by the order of the court in the composition proceedings, the defendants Bolles and Wilde had deposited for him, with full knowledge of all the facts, and subsequently gave a receipt in effect acknowledging that it was for the judgment of confirmation of the composition.

Can the plaintiffs now say that he was beyond the reach of the law or the court? Can they now say after he has brought his note into court, and proved it, that he or his note is beyond the reach or jurisdiction of the court?

How does the plaintiff's case differ from that of a foreign creditor who comes in and proves his claim, but who will not be affected if he stays out of court? Judge Cooley, referring to cases of this sort says,

"If, however, the creditor in any of these cases makes himself a party to proceedings under the insolvent law, he will be bound

thereby like any other party to judicial proceedings, and is not to be heard afterwards to object that his debt was protected by the Constitution from the reach of the law."

Constitutional Limitations, page 357, 6th Ed.

And in Bigelow *v.* Pritchard, 21 Pick. 172, the Court, referring to a claim which the statute of 1838 would not affect, unless proved, because it existed before the passage of that act, said: "It was optional with him to prove it or not, under the insolvent act. If he proved it, then he would be considered as having assented to the act."

Story on the Constitution, Vol. 2, § 1390 (5th ed.), after referring to cases or claims which the insolvent laws of a State do not reach, among which are claims existing prior to the passage of such insolvent laws, says:—

"Still, however, if a creditor voluntarily makes himself a party to the proceedings under an insolvent law of a State which discharges the contract, and accepts a dividend declared under such law, he will be bound by his own act."

In Van Hook *v.* Whitlock, 26 Wendell, 43, where an assignment was made under an act for the distribution of the property of insolvent insurance companies, it was held, "that though the act under which the assignment was made was unconstitutional and void, as to creditors whose demands existed previous to the passage of the act, still, that the creditors, having come in, and accepted dividends under the assignment, were estopped, and deprived of the right of calling upon the stockholders individually, for the payment of the residue of their debts, not received under the assignment."

Clay *v.* Smith, 3 Peters, U. S. 411.
Ferguson *v.* Landram, 5 Bush, 230.
The People *v.* Murray, 5 Hill, 468.
The City of Burlington *v.* Gilbert, 31 Iowa, 356.
Ruckman *v.* Alwood, 44 Ill. 183.
Maxwell *v.* Cochran, 136 Mass. 73.
Murray *v.* Roberts, 150 Mass. 353.
Fisher *v.* Currier, 7 Met. 424.
Gilbert *v.* Hebard, 8 Met. 129.
Clark *v.* Hatch, 7 Cush. 455:
Marsh *v.* Putnam, 3 Gray, 551.

The cases of Kimberly *v.* Ely, 6 Pickering, 440, and Agnew *v.* Platt, 15 Pickering, 417 can have no possible application to the case at bar. They assumed to decide nothing except the effect upon a foreign creditor of a discharge in insolvency proceedings. Such cases are clearly distinguishable from one where the plaintiff and defendant

are both citizens of the same State. It is further to be suggested that neither of the said cases can now be regarded as law.

In the case of Marsh *v.* Putnam, 3 Gray, 551, 565, Mr. Justice Thomas in giving the opinion of the Court says "Agnew *v.* Platt, 15 Pickering, 417 stands, if at all, on the decision in Ogden *v.* Saunders and Shaw *v.* Robbins, but is in conflict with Clay *v.* Smith, 4 Pet. 411, *and cannot be regarded as law.*"

The plaintiffs in error are estopped from denying the constitutionality of the composition acts or the validity of the discharge of the defendants under the same. Confirmation of the offer of composition by the insolvency court was a judgment of a court of competent jurisdiction upon the merits of the case in litigation between the plaintiffs in error and the defendants, and that judgment was a bar to all further litigation upon the same claim and demand between said parties and, therefore, was entirely conclusive upon them, and cannot be impeached in any collateral action, on the ground of the alleged unconstitutionality of said composition acts.

Daniels *v.* Tearney, 102 U. S. 415.
Folger *v.* Clark, 80 Maine, 237.
Morse *v.* City of Lowell, 7 Met. 152.
Bucklin *v.* Bucklin, 97 Mass. 256.

In the case of Fogler *v.* Clark the plaintiff's debt accrued before the passage of the insolvency law. The creditor proved his claim in the insolvency proceedings of his debtor and received dividends thereon. It was held that he was "estopped from setting up that the law is unconstitutional as to his claim."

The Court said, on page 241: "Of course, a void enactment does not become valid because a party admits it to be valid. But a party may, in many cases, be prevented by his acts from setting up the defence of unconstitutionality. He cannot, as the illustration goes, avail himself of the insolvency law, both as a shield and a sword. Seeking the enjoyment of its advantages, he takes its disadvantages as well. Proclaiming its validity, he cannot at the same time deny its validity."

In the case of Daniels *v.* Tearney, 102 U. S. 415, (page 421), in delivering the opinion of the Court, Mr. Justice Swaine said, "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defence, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect."

III.

If this disposes of this claim of these plaintiffs, clearly this court will not hear arguments from them as to the unconstitutionality of the law as to some other persons in some other case.

"Nor," says Judge Cooley, "will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not effect, and who has therefore no interest in defeating it."

Constitutional Limitations 6 Ed., page 196.

But if the question were open it could confidently be claimed that said composition acts are constitutional.

The insolvent law of Massachusetts is clearly constitutional.

Butler *v.* Goreley, 146 U. S. 303.

The said composition acts of 1884 and 1885 of that State made no material changes in the insolvent laws of that State otherwise than in the form of procedure, in which there are no vested rights.

Black on Constitutional Prohibitions, Sect. 133 and 147.
Kempton *v.* Saunders, 130 Mass. 236.

These composition acts are to the insolvent law of Massachusetts only what the composition act of Congress (act of June 22, 1874) was to the system of bankruptcy then in force under previous laws of Congress. All said provisions are, *as was held of the composition act of Congress, in Wilmot* v. *Mudge*, 103 U. S. 217, *in pari materia*. In that case it was said, that the composition act of Congress was "a part of the proceedings in bankruptcy," that "the resolution of composition is a proceeding in bankruptcy;" that the composition proceeding is "one of the modes which the bankrupt law authorizes of releasing the debtor."

The said composition acts of Massachusetts were framed on the analogy of the composition act of Congress, and are not distinguishable in principle from that act. They contain no principle that is new or unlike that of the insolvent law itself; they merely make a change of the method of procedure. One of the practical objections to the methods of assignments and distribution by assignees of the estates of insolvent debtors, and the obtaining by insolvent debtors of their discharge in the way provided in the insolvent law itself (Chap. 157 of the Public Statutes), was the delay, length of time, and expense involved in the usual breaking up of the insolvent's business. To avoid these evils was the purpose of these provisions for composition, under which a settlement is now often